84-1888

No.

Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

October Term, 1984

MGPC, INC.,
Petitioner,
VS.
DEPARTMENT OF ENERGY, CHARLES DUNCAN,
as Secretary of Energy,
ROBERT TEMPLETON, HARRY BANNON, and
MELVIN GOLDSTEIN,
as employees of the Department of Energy,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

RICHARD T. WILLIAMS
707 Wilshire Boulevard, 40th Floor
Los Angeles, California 90017
(213) 688-9000
Counsel for Petitioner.

KADISON, PFAELZER, WOODARD,
QUINN & ROSSI
707 Wilshire Boulevard, 40th Floor
Los Angeles, California 90017

HOWARD J. BRESSLER
JAMES L. ERKEL
10880 Wilshire Boulevard, Suite 1600
Los Angeles, California 90024
Of Counsel for Petitioner.

May 31, 1985

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

265 PM

QUESTIONS PRESENTED

The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 ("EPAA"), established a system of price controls governing the sale of crude oil and refined petroleum products, including products extracted from natural gas by independent gas processors. The President and his designees were authorized to grant exceptions from such price controls to prevent and alleviate hardship and gross inequities arising by reason of these regulations. In the instant case, after a finding of competitive disadvantage causing hardship and a separate finding of financial hardship by the pertinent federal agency, the Federal Energy Administration ("FEA"), an award of exception relief was made on November 22, 1974. The FEA conditioned any subsequent termination of its award upon particular procedures, which it is undisputed the agency did not follow. FEA, and Department of Energy ("DOE"") as successor to FEA, have treated the exception as void *ab initio*. The questions presented are:

1. Whether a federal agency, in this instance FEA, having acknowledged the existence of the conditions for regulatory relief to an applicant prescribed by Congress in the agency's enabling statute, and having determined relief was appropriate, may abrogate all relief without explanation, leaving a significant part of the original harm unremedied.

2. Whether a federal agency, having issued a final and appealable administrative order, and having prescribed for itself particular procedures by which that order could be withdrawn, may subsequently rescind its administrative order without following the procedures it specified for itself and despite economic hardship to the petitioner affected by its order?

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b). A list of the parent companies, subsidiaries and affiliates (except wholly owned) of the corporate petitioner, as required by Supreme Court Rule 28.1, is also set forth below.

Plaintiff (Petitioner here):

MGPC, INC. (formerly "McCulloch Gas Processing Corporation").

MGPC, INC. is a wholly-owned subsidiary of MCO Holdings, Inc., formerly "McCulloch Oil Company". MGPC, Inc. has no subsidiaries. The other subsidiaries and affiliates of its parent corporation are:

Braztah Corporation
Carbon Fuel Company
McCulloch Consolidated Coal Company
McCulloch Gas Processing (Alberta) Ltd.
MCO Communities, Inc.
MCO Development, Inc.
MCO Equities, Inc.
MCO Investments, Inc.
MGTC, Inc.
MIGC, Inc.
T.W. Energy Corp.
MCO Properties Inc.
American Land Realty Services, Incorporated
Cattlemen's Title Guarantee Company
Chaparral City Water Company
Fountain Hills Management Corporation
Havasu Development Corporation
Holly Development Co.
MCOP Advertising, Inc.

McCulloch Community Properties of Texas, Inc.
MCO Realty, Inc.
MCO Real Estate, Inc.
Pueblo West Development Co.
Pueblo West Properties, Inc.
Pueblo West Storage Co., Inc.
Spring Creek Corporation
Spring Creek Recreation Corporation
Spring Creek Utilities Co.
Top of Aspen, Inc.
Westcliff Development Corporation
Holiday Island Development Co.
Holiday Island Realty, Inc.
MCO Resources, Inc.
MCO Resources (Integrated) Corp.
MCOR Oil and Gas Corporation
MCOR Oil Exploration, Inc.
MCOR Oil Development, Inc.
MCR Exploration, Ltd.
MCR Geothermal Corporation
MCR Oil Corporation of Texas
MOG Exploration, Ltd.
Oil Investors, Inc.
Silver Eagle Resources, Ltd.
Watson Geophysics, Inc.
Watson Petroleum Exploration, Inc.
McCulloch Oil Management Company of California, Incorporated
D.R.J., Inc.
K-C Gas Company of New York, Inc.
IDS/McCulloch Oil Exploration Program — 1969
IDS/McCulloch Oil Exploration Program — 1970
IDS/McCulloch Oil Exploration Program — 1970-1

IDS/McCulloch Oil Exploration Program — 1971
IDS/McCulloch Oil Exploration Program — 1971-A
IDS/McCulloch Oil Exploration Program — 1971-B
IDS/McCulloch Oil Exploration Program — 1971-C
IDS/McCulloch Oil Exploration Program — 1972
IDS/McCulloch Oil Exploration Program — 1972-A
IDS/McCulloch Oil Exploration Program — 1972-B
IDS/McCulloch Oil Exploration Program — 1972-C
McCulloch Geothermal Energy Program
McCulloch Geothermal Energy Program II-A
McCulloch Geothermal Energy Program 1978-79-A
McCulloch Geothermal Energy Program 1978-79-B
McCulloch Geothermal Energy Program 1978-79-C
Ada Oil and Gas Income Fund — Series I — 1972-A
Ada Oil and Gas Income Fund — Series I — 1972-B
Ada Oil and Gas Income Fund — Series I — 1972-C
Ada Oil and Gas Income Fund — Series I — 1972-D
Ada Oil and Gas Income Fund — Series I — 1973-A
Ada Oil and Gas Income Program — Series II — 1973-B

Ada Oil and Gas Income Program — Series II — 1973-C
Ada Oil and Gas Income Program — Series II — 1973-D
Ada Oil and Gas Income Program — Series II — 1973-E
Ada Oil and Gas Income Program — Series II — 1974-A
Ada Oil and Gas Income Program — Series III — 1974-B
Ada Oil and Gas Income Program — Series III — 1974-C
MCOR 1984 Year-End Exploration Drilling Program, Ltd.

Defendants (Respondents here):

UNITED STATES DEPARTMENT OF ENERGY
CHARLES DUNCAN, as Secretary of Energy
ROBERT TEMPLETON, as an employee of the Department of Energy
HARRY BANNON, as an employee of the Department of Energy
MELVIN GOLDSTEIN, as an employee of the Department of Energy

TABLE OF CONTENTS OF PETITION

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	vi
Table of Contents of Appendix	vii
Table of Authorities Cited	x
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case and Proceedings Below	3
Reasons for Granting the Writ	11
Conclusion	16

TABLE OF CONTENTS OF APPENDIX

The Appendix Appears Following The Petition

Page

APPENDIX A

Opinion and Judgment of the Temporary Emergency Court of Appeals of the United States in *MGPC, Inc. vs. Department of Energy,* No. 10-52 (TECA, May 3, 1985) 1a

APPENDIX B

Findings of Fact and Conclusions of Law of the United States District Court for the District of Wyoming in *MGPC, Inc. vs. Charles Duncan, Secretary of the Department of Energy, et al.,* 581 F.Supp. 1047 (D. Wyo. February 29, 1984) 26a

APPENDIX C

Constitutional Provisions 61a

APPENDIX D

Statutes 62a

Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743, 12 U.S.C. § 1904 note (1976) 62a

Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627 (1973) 74a

Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 96 (1974) 90a

APPENDIX E

Price Control Regulations..... 104a

Mandatory Petroleum Price Regulations, Part 212, Subparts A through E, 39 Fed. Reg. 1924 (1974) 104a

Changes in the Price Regulations for Natural Gas Liquids and Natural Gas Liquid Products, 39 Fed.Reg. 44407 (1974) 137a

TABLE OF CONTENTS (APPENDIX)

Page

APPENDIX F

Procedural Regulations 169a

Mandatory Petroleum Procedural Regulations, Part 205, Subparts C and H, 39 Fed.Reg. 1924 (1974) 169a

Amended Mandatory Petroleum Procedural Regulations, Part 205, Subparts D and H, 39 Fed.Reg. 32,262 (1974) 174a

APPENDIX G

Ruling by the Federal Energy Administration 189a

Natural Gas Liquid Products: Pricing Prior to January 1, 1975, Ruling 1975-6, 40 Fed.Reg. 23272 (1975) 189a

APPENDIX H

Decision and Order of the Federal Energy Administration issued to *McCulloch Gas Processing Corporation,* Decision on Appeal, Case No. FEA-0248 (November 22, 1974) 197a

APPENDIX I

Decision and Order of the Federal Energy Administration issued to *McCulloch Gas Processing Corporation,* Case No. FEA-0248 Supplemental Order (March 6, 1975) 207a

APPENDIX J

Decision and Order of the Federal Energy Administration issued to *McCulloch Gas Processing Corporation,* Case No. FEE-1393 (May 6, 1975) 212a

TABLE OF CONTENTS (APPENDIX)

Page

APPENDIX K

Decision and Order of the Federal Energy Administration, Retroactive Application of Subpart K, Class Exception, Case No. FEX-0012 (August 29, 1975) 224a

TABLE OF AUTHORITIES CITED

Cases

Page

MGPC, Inc. vs. Duncan, 581 F.Supp. 1047 (D.Wyo. 1984) 2

Twin City Barge & Towing Corp. vs. Schlesinger, 603 F.2d 197 (TECA 1979) 5, 6, 8

Constitution

United States Constitution, Fifth Amendment..... 2

Federal Register

39 Fed.Reg. 32719 (Sept. 10, 1974) 5

39 Fed.Reg. 44407 (Dec. 24, 1974) 6

40 Fed.Reg. 23272 (May 29, 1975)..... 6

Miscellaneous

Committee of Conference, Conference Report 93-628, 2 U.S. Code Congressional and Administrative News 2688 (93rd Cong. 1st Sess. 1973) 12

Federal Energy Administration Ruling 1975-6, 2 FEA ¶ 84, 901 ..... 6, 7

House Report No. 93-531, 2 U.S. Code Congressional and Administrative News 2582 (93rd Cong. 1st Sess. 1973) 12, 13

Rules

United States Supreme Court Rules, Rule 21.1(b) . ii

United States Supreme Court Rules, Rule 28.1 ii

TABLE OF AUTHORITIES CITED

Page

Statutes

Code of Federal Regulations, Title 10, Part 212, Subpart E 5, 7

Code of Federal Regulations, Title 10, Part 212, Subpart K 6, 7, 10

Economic Stabilization Act of 1970, Sec. 211(g), Pub. L. No. 91-379, 84 Stat. 796, as amended by Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. §1904 note (1976) 2, 13

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 ..... i, 2, 11, 12, 13, 14

Emergency Petroleum Allocation Act of 1973, Sec. 5(a)(1), Pub. L. No 93-159, 87 Stat. 627, 633 .. 2

Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 2

United States Code, Title 7, Sec. 1444(d) 3

United States Code, Title 49, Sec. 1386 3

No.

In the Supreme Court

OF THE

United States

October Term, 1984

MGPC, INC.,
Petitioner,

VS.

DEPARTMENT OF ENERGY, CHARLES DUNCAN,
as Secretary of Energy,
ROBERT TEMPLETON, HARRY BANNON, and
MELVIN GOLDSTEIN,
as employees of the Department of Energy,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner, MGPC, Inc. ("MGPC") hereby prays that a Writ of Certiorari issue to review the opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") made and filed on May 3, 1985, reversing the opinion of the United States District Court for the District of Wyoming granting summary judgment to MGPC on February 29, 1984.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") entered May 3, 1985, is as yet unreported and appears at Appendix A hereto. The opinion of the United States District Court for the District of Wyoming in *MGPC, Inc. vs. Duncan*, reported at 581 F.Supp. 1047 (D.Wyo. 1984), appears at Appendix B hereto.

JURISDICTION

TECA's judgment was entered on May 3, 1985. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. § 1904 note (1976)), which appears at Appendix D, page 72a, and incorporated by reference in section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. No. 93-159, 87 Stat. 627, 633, which appears at Appendix D, page 85a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution is reprinted at Appendix C. The Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, are reprinted at Appendix D, pages 62a through 73a. The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, is reprinted at Appendix D, pages 74a through 89a. The Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96, is reprinted at Appendix D, pages 90a through 103a.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Under a variety of federal regulatory programs, ranging from the allocation of acreage among farmers for commodity price support programs (7 U.S.C. § 1444d) to the classification of air carriers (49 U.S.C. § 1386), agencies are permitted to grant exceptions or exemptions from their regulations in order to relieve hardship and inequity arising from strict application of such rules. Congress has authorized such relief in acknowledgment that the pursuit of statutory objectives requires deviation in individual cases from broadly-worded regulations which must be applied in procrustean fashion to ever-changing industries.

In the instant case, this Court is asked to review one such exception, involving relief from the application of price controls designed for crude oil refiners to quite a different type of firm, a processor of natural gas. The pertinent agency, here the Federal Energy Administration ("FEA"), granted exception relief to petitioner MGPC on November 22, 1974, finding both competitive and financial hardships were being suffered by MGPC as the unintended and inadvertent result of the application to it of emergency regulations. The relief furthered statutory objectives to preserve and foster the competitive viability of independent firms and to foster equitable pricing.

Following the publication of amended regulations that were purely prospective in effect, which rules were more adapted to the technology and circumstances of gas processors, FEA proposed that exception relief be terminated, absent a contrary showing by MGPC. See Appendix I. Several months later, without following the procedures FEA prescribed for itself in its previous orders, the agency not only terminated exception relief

but rescinded it *ab initio*, concluding that the financial hardship originally presented had been averted. In doing so, FEA failed entirely to address the larger and longer term competitive inequity and hardship caused by the regulations during 1974.

Upon appeal, the District Court granted summary judgment in favor of petitioner MGPC, finding the termination of relief defective and approving the continuance of exception relief to alleviate the competitive disadvantage and hardship found by FEA itself. In proceedings below, the Temporary Emergency Court of Appeals ("TECA") reversed the District Court and ordered the entry of summary judgment in favor of defendants, thus leaving the original competitive harm utterly unremedied.

Where Congress has authorized exceptions to comprehensive regulatory programs, and the pertinent agency has found an exception to be warranted and necessary to further the statutory objectives entrusted to it, the agency is under a duty to provide relief to ameliorate the hardship it has found. Like any other administrative decision, such relief ought not be withdrawn without a statement explaining an agency decision, a statement that is rational and supported by substantial evidence. It is the failure of that process which occasions the present Petition.

A. Background

As a consequence of the oil embargo of 1973-74, Congress gave the President authority to allocate crude oil and refined petroleum products and to regulate the prices thereof, from the wellhead to the retail pump. Emergency Petroleum Allocation Act, *supra,* at Appendix D. Abruptly, new regulatory bodies were formed, regulations were written, announced, enforced, and amended. The immediate focus of these administrative energies was the regulation of crude oil; Congress explicitly exempted

natural gas from this regulatory program, for transactions in that fuel were scrutinized already by the Federal Power Commission. However, those products made by gas processors from natural gas which can chemically also be produced from crude oil, such as propane, were made subject to price controls.

The present case involves an independent processor of natural gas. Petitioner MGPC purchased "raw" natural gas from which it extracted by compression and refrigeration various natural gas liquids which it distilled into products, such as propane and butane and natural gasoline. MGPC paid producers of its "raw" natural gas a set percentage of the proceeds from the sales of its products and the residue gas which remained after the extraction process.

On January 15, 1974, the Federal Energy Office ("FEO") published pricing regulations for "refiners." These regulations were codified in C.F.R. Part 212, Subpart E, and are reprinted at Appendix E, pages 104a through 136a. Although these regulations defined a "refiner" to include firms that "refined liquid hydrocarbons from oil and gas field gases," price increases were only allowed under the regulations for "increases in the cost of crude oil," a feedstock not employed by gas processors. The technology and types of costs incurred by gas processors differed from those of crude oil refiners, just as did their feedstock, and the regulations designed for crude oil refiners were not susceptible of application by gas processors. Indeed, the Federal Energy Administration ("FEA") acknowledged in September 1974 that its pricing rules "are not well suited to gas processors." 39 Fed.Reg. 32719 (September 10, 1974). *See also Twin City Barge & Towing Corp. vs. Schlesinger,* 603 F.2d 197, 200 (TECA 1979) ("This situation can only lead to confusion

as to the lawful prices [gas processing] plant operators and marketers could charge and consumers could pay").

A new set of regulations specifically intended for application by natural gas processors was promulgated by the FEA on December 24, 1974, 39 Fed.Reg. 44407 (December 24, 1974). These rules were codified at 10 C.F.R. Part 212, Subpart K, and are reprinted at Appendix E, pages 137a through 168a. These rules were *prospective* only in their application. Some months later, on May 29, 1975, the FEA published its Ruling 1975-6, observing:

> "The changes in the regulations affected by Subpart K were prospective. The FEA has concluded, however, that the basic issues which the subpart was intended to resolve have been in existence since the inception of FEA regulations, and that, insofar as practicable, they need to be resolved with respect to the period prior to January 1, 1975, during which Subpart E [refiner regulations] applied to the pricing of natural gas liquid products, particularly in view of the fact that FEA compliance actions, as well as private rights, remain dependent in large measure upon the application and interpretation of Subpart E to natural gas liquid price determinations." 40 Fed.Reg. 23272 (May 29, 1975).

In Ruling 1975-6, the FEA authorized gas processors to justify price increases by increases in their experienced cost of "shrinkage" (the loss in value of residue natural gas arising as the result of the removal of liquid products in the extraction process), as a substitute for increased crude oil costs. At the same time the FEA proposed, and on August 29, 1975 it issued, a Class Exception, published at 2 FEA ¶ 84,901 and reprinted at Appendix K, pages 224a through 235a. Under the Class Exception, various adjustments could be made to pricing under Subpart E prior to January 1, 1975 so that gas processors could

enjoy more of the provisions prospectively available under Subpart K. The issuance of this relief was necessary, FEA stated, to correct the gross inequity which it had identified in its Subpart E price regulation, an inequity that effectively precluded gas processors from increasing their prices prior to January 1, 1975. *See* Appendix K at pages 228a through 231a. The very premise of its Class Exception was FEA's judgment that its prospective Subpart K rules and its Ruling 1975-6 were not sufficient to address the inequities that predated January 1, 1975 for the entire group of gas processors, one of whose independent members is petitioner MGPC.

The relief granted in the Class Exception was available equally to gas processors and to their competitors, crude oil refiners who also operated gas processing plants. The Class Exception did not permit additional price increases but only permitted justification for prices previously charged. Thus, the Class Exception operated not at all to relieve the competitive hardship which had confronted petitioner MGPC. In adopting its Class Exception, FEA gave no consideration to this hardship nor to the exception it had formerly awarded MGPC.

MGPC had been uniquely injured as the direct result of FEA's refiner price controls. Its competitors in the Powder River Basin of northeastern Wyoming were major refiners of crude oil — Phillips Petroleum and Atlantic Richfield Company — who also operated gas plants. Those major refiners benefited from the Subpart E refiner product cost pass-through regulations, 10 C.F.R. Part 212, Subpart E, Appendix E at 117a through 136a. Such refiners were able to increase their product prices, including at their gas processing plants, by allocating their cost increases from buying crude oil during and after the Arab Oil Embargo.

For many years predating price controls, it had been the widespread custom and practice in the gas processing industry that raw natural gas was acquired by gas processors from producers under "net-back contracts," described above, whereby a processor pays producers a percentage of the proceeds it receives from the sale of liquid products and residue gas. Final settlement and payment is made after the gas feedstock has been processed. By contrast, refiners pay a fixed unit price for crude oil in advance. The price paid for crude oil does not vary depending upon the revenues received by the refiner from the sale of its products.

Thus, crude oil refiners were able to identify increases in the acquisition cost of their crude oil feedstock and, using a portion of such increased cost, were lawfully permitted to increase their selling prices for liquid products. As a result, they could assure producers selling natural gas to them of increased revenues above those which independent gas processor competitors could promise. Producers with new streams of gas available for contract were therefore inclined to prefer crude oil refiners. The result was that Phillips Petroleum and Atlantic Richfield Company were able to add gas reserves in Wyoming in 1974, and MGPC could not. The implications for immediate and ongoing competitive hardship were several.

First, it is a reality that production from gas fields declines over time. *Twin City Barge & Towing Corp. vs. Schlesinger*, 603 F.2d 197, 200 (TECA 1979). Thus, gas processors must constantly replenish their reserves by acquiring new streams of gas. The long-term competitive viability of a gas processor depends on its success in this endeavor. To acquire new streams of gas in a developing field, the processor lays gathering lines (pipelines), to each newly contracted well. It is obviously less expensive

and more advantageous to contract with and connect to nearby wells. Interruption in gas acquisition, such as occurred for MGPC by reason of FEA regulations in 1974, prevents that incremental development of gas reserves. Refiner competitors were able to enlarge their holdings in the Powder River Basin, while MGPC was progressively left further behind. Catching up is hardly feasible for a smaller competitor when the rules favor its major oil company opponents. The longer an interruption of its ability to acquire new gas continued, the greater was the the economic penalty visited both immediately and prospectively on MGPC since when a processor contracts for gas reserves, it is acquiring not only present production but the future production of a given well, either for a term of years or the life of that well.

B. The Proceedings Below

On November 22, 1974, the FEA's Office of Exceptions and Appeals correctly found in reviewing MGPC's petition and supporting data, that the FEA's refiner price controls had precluded MGPC from acquiring any new supplies of gas in the Powder River Basin of Wyoming for over a year. Price controls had, in effect, granted its principal competitors, Phillips Petroleum and Atlantic Richfield Company, major integrated crude oil refiners, a clear-cut opportunity for, and almost a guarantee of, access to new gas reserves. Producers were inclined to and did contract with these refiners, confident they would receive more than MGPC could pay, MGPC being artificially constrained in its prices because of confusion in FEA's regulations.

When the FEA published new price regulations adapted to gas processors on December 24, 1974, it made such regulations prospective in effect. *See* Appendix E at pages 137a through 168a. These rules, by their terms, applied equally to gas processors such as MGPC and also

to crude oil refiners, such as Phillips and Atlantic Richfield Company, who operated gas plants. Prospectively, these rules prevented the competitive gap between gas processors such as MGPC and crude oil refiners, such as Phillips, from becoming larger. It remedied the federally-caused disparity already in existence not at all. Failing to observe this critical point, and notwithstanding that FEA had not adopted any rules or interpretations clarifying prices that could be charged by gas processors prior to Subpart K, the FEA's Office of Hearings and Appeals proposed on March 6, 1975, to rescind exception relief to MGPC, on the purported basis there was no further need therefor.

When MGPC timely protested, it heard nothing further. No notice and no hearing ensued, but in a separate proceeding several months later, FEA tersely declared that the November 22 exception award had been terminated. When MGPC moved in the District Court for declaratory judgment on the duration and extent of exception relief, the Department of Energy ("DOE"), successor to FEA, maintained exception relief had been rescinded *ab initio,* and not merely terminated from further operation.

The premise noted by FEA in its May 6, 1975 termination (Appendix J) was that financial hardship anticipated by MGPC during 1974 had not materialized in that period. This had been *one* of the *two* bases for exception relief; its absence purportedly made exception relief unnecessary for any purpose. The agency never addressed after November 22, 1974, however, the competitive disadvantage it identified in its award of exception relief, a disadvantage that persisted and was never corrected.

On appeal, the District Court found that FEA had failed to comply with the specific procedures set forth in its November 22 Order for the withdrawal of exception

relief, including notice and comment and a decision justifying the withdrawal of relief. In the face of the continuing competitive disadvantage noted by FEA, the District Court declared the purported determination of exception relief to have been defective and found that it was intended, in order to fulfill its purpose, to be retroactively effective through 1974 and thereafter until lawfully terminated. TECA reversed, giving no consideration to the competitive hardship which had stimulated the original exception relief. TECA acknowledged that it was undisputed that the FEA had not complied with the procedures it set for itself in withdrawing exception relief. *See* Appendix A at page 13a.

REASONS FOR GRANTING THE WRIT

The reason for exception relief under any regulatory program is to assure the effectuation of congressionally-mandated purposes. Necessarily, uniform regulations providing economic controls over a changing industry will be a strait-jacket upon some participants in the industry, warranting individual adjustments to relieve hardship where Congress so provides.

Under the Emergency Petroleum Allocation Act of 1973, Congress specified several objectives for price controls. In particular, Congress required that price regulations "to the maximum extent practicable" shall provide for:

> "... Preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers;

> " . . . equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas in the United States and sectors of the petroleum industry, including independent refiners, small refiners, non-branded independent marketers, branded independent marketers, and among all users;
>
> " . . . economic efficiency; and
>
> " . . . minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms." (Appendix D at pages 77a through 78a).

The joint explanatory statement of the Committee of Conference, Conference Report 93-628, adopted the House provisions with respect to the objectives set forth in the foregoing legislation. *See* 2 U.S. Code Congressional and Administrative News 2688, at 2698 (93rd Cong. 1st Sess. 1973). The conference specifically included small refiners (a category including MGPC) within the protection of these objectives. In the statute, the definition of "refiner" embraces petitioner MGPC. The Interstate and Foreign Commerce Committee's Report of the legislation, House Report No. 93-531, was explicit on the need to protect the independent sector. Thus, the report noted:

> "There can be little doubt that the independent sector of the petroleum industry, especially at the marketing level, suffered most as a result of the gasoline shortages of this past summer and few would question that it would be the independent sector that would suffer most from the shortages predicted for this coming winter. . . .
>
> " . . . The Committee firmly believes we should not allow shortages of gasoline — or for that matter shortages of crude oil, residual oil or other refined

petroleum products — to cause shortages of competition. The self-regulating laws of supply and demand are not currently operating in the petroleum product market. It is imperative that the Federal government now accepts its responsibility to intervene in these markets to preserve competition. Witnesses have testified that if we fail to do so, the cost to the consumer will ultimately be measured in many millions of dollars.

"Not only will the allocation of refined products to independent marketers assure their competitive viability, it will help assure that some of our regional needs are met." 2 U.S. Code Congressional and Administrative News 2582 at 2586 (93rd Cong. 1st Sess. 1973). *See* also *id.* at 2589-90.

To enable price controls to fulfill these statutory goals, given the complexity of the petroleum industry, FEA was permitted to grant exceptions to individual firms upon their application and proof of inequity and serious hardship. This practice had been instituted under the earlier price controls authorized by the Economic Stabilization Act Amendments of 1971 (*See* Appendix D at pages 62a, 66a and 67a). These provisions were explicitly incorporated by Congress into the Emergency Petroleum Allocation Act. *See* Appendix D at page 85a. When Congress established the FEA to administer petroleum price controls, it repeated and emphasized the availability of exception relief. *See* Appendix D at pages 100a through 101a.

The failure of FEA initially or adequately to provide price controls applicable to gas processors was pardonable in the emergency of the time: The agency was simply overtaken by the enormous complexity of its tasks. This increased the importance of exception relief, exactly as it

must in any regulatory program involving a complex industry.

FEA *granted* exception relief to MGPC on November 22, 1974 and found in its award that MGPC, an "independent refiner" within the meaning of the Emergency Petroleum Allocation Act, *supra,* was suffering a competitive hardship as the direct result of price control regulations. MGPC was unable to acquire new gas reserves; such reserves are the life blood of a gas processor and its assurance of competitive viability. The regulations, however, permitted crude oil refiner competitors advantage to obtain aggressively such reserves. *See* Appendix H. This discussion was never reconsidered by FEA. It was accurate and remains so. FEA had found exactly that circumstance occasioning exception relief which Congress had expected the agency would seek out — and which Congress had expected the agency would then remedy.

FEA failed to afford a remedy for the competitive hardship that it found to exist, by terminating, then treating as rescinded, the ordering paragraph of its exception grant.

When it fulfills a congressional purpose to provide for exception relief, and when the designated agency, here FEA, acknowledges the criteria are met to justify exception relief, the agency cannot thereafter withdraw relief without explicitly describing and explaining the justification for its later action. For Congress to have prescribed explicit goals for price controls, and FEA to have identified a need for exception relief to MGPC to avert competitive hardship, then for FEA to withdraw that relief without explanation and leave intact competitive harm unremedied, subverts the congressional intent for price controls. To single out a gas processor and leave this result is to deny that gas processor due process and the equal protection of the law.

Procedurally, it is a requirement of due process that notice and an opportunity for hearing accompany the withdrawal of any significant governmental benefit. It is likewise a requirement of due process that an administrative agency employ reasoned decision-making and explain itself when it chooses to reverse a course of action. In this respect also, FEA erred. TECA noted the failure of FEA to follow the very procedures that it set for itself on November 22, 1974 in its grant of exception relief when later reviewing it. TECA, however, elected to excuse FEA on the purported basis that MGPC suffered no prejudice from the agency's abrupt and unnoticed change in procedures. This was flatly erroneous.

Granting of exception relief afforded MGPC a limited amount of assistance to meet and relieve the competitive disadvantage price control rules confronted it with. Removing the relief while not discussing the competitive hardship that occasioned the exception is nothing but arbitrary. Competitive hardship persisted and dogged MGPC for the duration of price control. The adoption of new gas processor rules only prevented the hardship from growing larger after 1975; it did not remove the hardship from 1974. That task was left exclusively to the exception given MGPC, the only regulatory act whose benefits were not equally conferred upon gas processors and refiner-competitors operating gas plants.

Although the particular errors of the Court of Appeals below in reversing the District Court and voiding exception relief affected one firm under a regulatory program that expired in 1981, the problem presented in this case persists and pervades every agency's programs which provide for administrative adjustments and exception. There is nothing unique to this statute or this petitioner about an award of relief that followed upon the agency's determination that all the statutory criteria authorizing

such relief had been met. The withdrawal of such relief, without explanation, is likewise not unique to this statute or this petitioner. While one must acknowledge the freedom to be given to administrative agencies to correct their own mistakes, and thus to modify their own orders before judicial intervention is required, this freedom is not license to controvert and undermine the very purposes of exception relief. Yet, such was the result to MGPC.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted.

May 31, 1985.

Respectfully submitted,

RICHARD T. WILLIAMS*
707 Wilshire Boulevard,
40th Floor
Los Angeles, California 90017
(213) 688-9000
Counsel for Petitioner
**Counsel of Record*

KADISON, PFAELZER, WOODARD,
QUINN & ROSSI
707 Wilshire Boulevard, 40th Floor
Los Angeles, California 90017

HOWARD J. BRESSLER
JAMES L. ERKEL
10880 Wilshire Boulevard, Suite 1600
Los Angeles, California 90024
Of Counsel for Petitioner

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-52

MGPC, INC., a Wyoming corporation,
PLAINTIFF-APPELLEE,

v.

DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Wyoming

Argued: December 10, 1984 Decided: May 3, 1985

DON W. CROCKETT, with whom John L. Gurney, Department of Energy, Washington, D.C.; and Richard K. Willard, Department of Justice, Washington, D.C., were on briefs for Defendants-Appellants.

RICHARD T. WILLIAMS, with whom Howard J. Bressler and David L. Huard of Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, were on the brief for Plaintiff-Appellee MGPC, Inc.

Before JAMESON, CRAIG and MCNICHOLS, Judges.

MCNICHOLS, Judge.

The United States Department of Energy (DOE), the defendant below, brings the present appeal from an order of the United States District Court for the District of Wyoming granting Summary Judgment to MGPC, Inc., (MGPC) the plaintiff below. See *MGPC* v. *Duncan,* 581 F.Supp. 1047 (1984). For reasons stated and discussed below, we reverse.

I.

Factual Background

Pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. Section 1904, note (ESA) and the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Section 751 et seq. (EPAA), the Department of Energy and its predecessor agencies[1] promulgated, in 1973, regulations governing the maximum selling prices at which crude oil refiners and natural gas processors could sell their products.

At all times material herein, MGPC (formerly known as McCulloch Gas Processing Corporation, Inc., see *MGPC, Inc.* v. *Department of Energy,* 673 F.2d 1277, 1279 (1982)) was a processor of natural gas. MGPC purchased "raw" natural gas under "net back" contracts. Pursuant to the "net back" contracts MGPC would refine or process the natural gas into natural gas liquids (NGL) or natural gas liquid products (NGLP), such as propane and butane, for sale to commercial and residential customers. MGPC paid the "raw" gas producer a set percentage of the proceeds of the sale of the NGLP with an allowance for the residue gas in exchange for the "wet" gas. As a processor of NGLP, MGPC was, as of 1974,

---

[1] The authority to promulgate regulations to enforce the relevant provisions of the ESA and the EPAA was initially vested in the Cost of Living Council. (CLC) The president delegated the authority to the Federal Energy Office (FEO) in Executive Order No. 11,748, 39 F.R. 33,575 (December 6, 1973). After passage of the Federal Energy Administration Act of 1974, 15 U.S.C. Sections 761 et. seq., FEO's rulemaking and enforcement functions were transferred on June 27, 1974 to the Federal Energy Administration (FEA). Executive Order No. 11,790, 39 F.R. 185. The authority was then transferred to Defendant DOE on February 7, 1978 after passage of the Department of Energy Organization Act, 42 U.S.C. Sections 7101 et seq. by Executive Orders Nos. 12,099, 42 F.R. 46,267 (9-15-77) and 12,038, 43 F.R. 957. President Reagan terminated Defendant DOE's price control authority on January 28, 1981. Executive Order No. 12,287, 46 F.R. 9909.

subject to the Department of Energy's price regulations set-out in Subpart E of Part 212, 10 C.F.R. See 10 C.F.R. Section 212.31.

On June 6, 1974 MGPC applied to the Office of General Counsel (OGC) and Office of Exceptions and Appeals (OEA) of the Federal Energy Administration (FEA) (a predecessor agency of the Department of Energy) for exception relief from the FEA's pricing regulations set forth in 10 C.F.R. Section 212.82. These regulations restricted MGPC to MGPC's May 15, 1973 base price of 6.88 cents per gallon. MGPC petitioned the OEA to allow MGPC to charge a weighted average of 27.7 cents per gallon for MGPC's NGLPs. MGPC submitted financial statements to the OEA which statements evidenced a projected operating loss for MGPC of $764,000 during 1974 if MGPC were bound by the May 15, 1973 base price.

MGPC's requested price increase of 20.82 cents per gallon would more than compensate MGPC for its projected $764,000.00 loss. MGPC maintained, however, that the 20.82 cent per gallon increase was necessary to compensate MGPC for a competitive disadvantage MGPC suffered as a result of the price regulations. The competitive disadvantage arose because the price regulations imposed in Subpart E of Part 212 of 10 C.F.R. were tailored to controlling the prices at which producers of crude oil sold their product and were ill-suited for processors of NGLPs. The Subpart E regulations were ill-suited for natural gas processors because natural gas processors, using the net-back supply contracts, were unable to pass through their increased production costs and were, as a result, locked into their May 15, 1973 base prices. Integrated crude oil refiners, on the other hand, could average prices for NGLPs, whether produced from crude oil or natural gas, and thus could pass through increased product costs for crude oil up to the maximum lawful

selling price for their NGLPs. The integrated crude oil refiners, who also used net-back contracts in purchasing new natural gas supplies, could, therefore, pay producers of natural gas more than natural gas processors could pay for new natural gas supplies. Processors of natural gas, therefore, could not compete for new gas reserves. Consequently, MGPC could not obtain enough new gas reserves to operate at full capacity.

On September 12, 1974 the FEA denied plaintiff's requested exception relief on the ground that the MGPC failed to substantiate its claim that it was incurring substantial hardships or gross inequities different in kind than all natural gas processors. MGPC appealed the FEA's Decision and Order and on November 22, 1974 the OEA of the FEA reversed the September 12 denial of exception relief. (Record on Appeal at 1567; hereinafter cited (R.____)). In the November 22, 1974 Decision and Order, the OEA acknowledged that the FEA had indicated, in a preface to proposed Subpart K of Part 212 of 10 C.F.R., that the FEA was aware Subpart E of 10 C.F.R. Part 212 was ill-suited to the customs and needs of the natural gas processing industry and, as a result, many independent natural gas processors' were experiencing operating difficulties which could, if they had continued, have had serious adverse long-time consequences. (R. 1571). The OEA declined to award exception relief to MGPC on the basis that Subpart E was ill-suited to natural gas processors because "it would be inappropriate for exception relief to be granted at this time in view of the fact that the present regulatory system applies in the same way to all independent natural gas processors." (R. 1571). The OEA declined to award exception relief because of the ill-suited regulations for the further reason that the FEA had recognized the problem natural gas processors faced and was preparing to issue the Subpart K regulation to remedy the inequity.

On the other hand, the OEA recognized that MGPC would suffer a serious financial hardship in 1974. The OEA determined, therefore, that MGPC was entitled to "interim exception relief" as follows:

> In order to alleviate the serious hardship found to exist the FEA has determined that interim exception relief should be provided at this time pursuant to which MGPC would be permitted to adjust its May 15, 1973 selling prices for the purpose of Section 212.82 so that if the resultant price increases were apportioned over the course of 1974 MGPC would not have experienced the $764,000 operating loss which it projects it will incur during its 1974 fiscal year. A further determination has been made that the FEA Office of Exceptions and Appeals should retain jurisdiction over this matter so that MGPC may petition for further exception relief in the event the FEA regulations which are generally applicable to independent natural gas processors are not revised by December 15, 1974 so as to alleviate any gross inequity or further serious hardship which MGPC alleges that it is experiencing. (R. 1572).

In light of the OEA's determination that MGPC was entitled to 1.5 cents of exception relief the OEA ordered:

> (4) Notwithstanding contrary provisions in 10 CFR, Part 212 MGPC may determine its May 15, 1973 selling price for propane, butane and natural gasoline for purposes of Section 212.82 by determining the weighted average price at which each such product was lawfully sold to each class of customer on May 15, 1973 and by then adding to each of those prices an amount necessary to increase the overall weighted average selling price for the covered products which MGPC obtains for natural gas by no more

than 1.5 cents per gallon of natural gas liquids processed.

The OEA conditioned the 1.5 cents of exception relief as follows:

> (5) In the event the FEA promulgates new generally applicable regulations which govern the determination of the maximum permissible selling prices of propane, butane and/or natural gasoline, the FEA may by written order rescind this interim exception approval in whole or in part; provided that, prior to taking any such action, the FEA shall inform the McCulloch Gas Processing Corporation of the proposed action and afford MGPC of an opportunity to comment upon that proposed action.

As indicated in the portions of the November 22, 1974 Decision and Order previously quoted, the OEA was willing to reconsider MGPC's request for exception relief if the FEA did not issue new regulations generally applicable to natural gas processors by December 15, 1974. The FEA did not promulgate the new regulations prior to December 15, 1974 and, as a result, MGPC renewed its request for further exception relief. Before the FEA was able to act upon MGPC's request, the FEA promulated the new generally applicable regulations. The regulations, set out in 10 C.F.R. Part 212, Subpart K, were issued on December 24, 1974 and were to become effective on January 1, 1975. The Subpart K regulations permitted MGPC to raise its prices for propane by 7.8 cents per gallon.

As a result of the promulgation of the Subpart K regulations the OEA, on January 13, 1975, informed MGPC, via a letter from the Assistant Director of OEA Richard Tedrow, that MGPC's December 16, 1974 request for further exception relief was denied. The letter stated

that if MGPC determined that the provisions of 10 C.F.R., Part 212, Subpart K, were "insufficient to alleviate the serious hardship or gross inequity which MGPC was experiencing prior to the promulgation of Subpart K, the firm should request an exception from that regulation." (R. 1679).

Pursuant to the January 13, 1975 letter, MGPC filed on January 15, 1975, an application for exception relief from the new Subpart K regulations. In MGPC's application for relief from Subpart K, MGPC stated that the regulated sales price per gallon was insufficient to allow MGPC to pass through MGPC's increasing costs to its customers. In the application MGPC claimed the regulated sales price as of the date of the application was 16.2 cents per gallon. Since the actual regulated sales price under Subpart K was 14.7 cents per gallon, as of the date of application, it is apparent that MGPC was proceeding on the theory that MGPC could apply the 1.5 cents per gallon of exception relief from the Subpart E regulations to the regulated price under Subpart K.

Also on January 15, 1975 Frank Zarb, Administrator of the FEA, replied to a December 6, 1974 letter from M. Witte, Vice Chairman of the Board of McCulloch Interstate Gas Corporation (an affiliated company of MGPC). The January 15, 1975 Zarb letter stated that the 1.5 cents of exception relief was "no longer relevant" in light of the new Subpart K regulations. (R. 3055).

On February 19, 1975 the OEA responded to MGPC's petition for exception relief from the Subpart K regulations. In the response the OEA implicitly informed MGPC that MGPC was not entitled to use the 1.5 cents of exception relief the OEA previously granted MGPC in connection with the Subpart K regulations. The OEA so informed MGPC by directing MGPC to use 14.7 cents, not 16.2 cents, in submitting certain pro forma statements

to the OEA; which statements related to MGPC's new request for exception relief (R. 1764). MGPC ignored the OEA's directive and claimed the 1.5 cents of exception relief when it submitted the pro forma statements referenced above. (R. 1829).

On March 6, 1975 the FEA issued a Supplemental Order to the November 22, 1974 order. The March 6 order stated that the November 22 relief was granted only with respect to Section 212.82 (a Subpart E regulation). Because MGPC was afforded more relief under Subpart K than under the interim exception determination, the OEA rescinded the exception relief granted to MGPC on November 22, 1974. (R. 1591-93). The order was to be a final order unless MGPC filed information within ten days of receipt with OEA which would show cause in law or fact why the FEA action was erroneous. (R. 1593). Counsel for MGPC was served by certified mail on March 11, 1974. (R. 1594). MGPC filed material in opposition to this order on March 21. (R. 1601). The OEA made no formal response to the material MGPC filed on March 21. On May 15, 1975, however, the OEA denied MGPC's January 15, 1975 request for exception relief from Subpart K. In the May 15, 1975 denial the OEA indicated that the information MGPC submitted in response to the March 6, 1975 order was insufficient to establish cause why the March 6, 1975 order should not be final and, therefore, held that the March 6, 1975 order had become final.

Even though the May 15, 1975 denial reaffirmed the March 6, 1975 termination of the 1.5 cents of exception relief, MGPC continued to apply the 1.5 cent per gallon relief until January 30, 1981 when the DOE's authority was terminated by Executive Order Number 12287, 48 Fed. Reg. 9909 (January 30, 1981). MGPC claimed the FEA had orally represented to MGPC that MGPC could

properly continue to apply the November 22, 1974 exception relief.

In December of 1977 the DOE completed an audit of MGPC and concluded that the 1.5 cent relief was only applicable under Subpart E. The auditor concluded that MGPC could avail itself of the 1.5 cents of exception relief only if MGPC priced its products in accordance with Subpart E. If MGPC chose to price its products pursuant to Subpart K, then MGPC could not use the 1.5 cents of exception relief previously granted. In January 1978 a Notice of Probable Violation was issued which alleged that MGPC accumulated over $3 million in overcharges. After MGPC's reply in March the DOE, in January 1979, ordered MGPC to make restitution of the overcharge with interest.

On September 21, 1979 MGPC filed a complaint in the United States District Court for the District of Wyoming. MGPC alleged that the 1.5 cents interim relief was inadequate to alleviate its hardship and that the relief had not been effectively terminated upon the promulgation of the new Subpart K regulations or by virtue of the OEA's orders of March 6 and May 15, 1975. (R. 2339-40). MGPC sought to permanently enjoin the DOE from denying MGPC the continued use of the 1.5 cents of exception relief.

On September 7, 1982 MGPC filed a Motion for Summary Judgment. The DOE moved to strike MGPC's Motion for Summary Judgment on the grounds that the affidavits MGPC filed contemporaneously with its motion contained information not contained in the official administrative record. In the alternative, the DOE moved pursuant to Rule 56(f) for a continuance of the Motion for Summary Judgment in order to take the discovery necessary to controvert the evidence contained in MGPC's new affidavits. The DOE did not respond to MGPC's Motion

for Summary Judgment prior to a "Hearing on All Pending Motions" on September 13, 1983. The DOE contended that the court should rule on the DOE's preliminary motions and subsequently allow the DOE time in which to respond to MGPC's Motion for Summary Judgment. The district court denied the DOE's preliminary motions and, without allowing the DOE an opportunity to formally respond to MGPC's Motion for Summary Judgment, granted MGPC's motion.

II

ISSUES ON APPEAL

A. Whether the District Court erred in holding, as a matter of law, that the November 22, 1974 exception relief order was not terminated or rescinded by the March 6, and May 15, 1975 orders.

B. Whether the District Court erred in holding that the November 22, 1974 exception relief order was not terminated, and whether the November 22, 1974 order was merely terminated rather than rescinded and thus void ab initio.

C. Whether the District Court erred in holding, as a matter of law, that the exception relief awarded to MGPC could be applied in conjunction with 10 C.F.R. Part 212, Subpart K.

D. Whether the District Court erred in ruling, as a matter of law, that the exception relief awarded to MGPC could be applied retroactively from November 22, 1974 back to January 1, 1974.

III

DISCUSSION

Before addressing the merits of the present case it is important to note the standard of review this court must apply to the district court's decision. An order granting summary judgment to a party can be entered and can be affirmed on appeal only if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Whether a genuine issue as to any material fact exists in a given case is seldom an easy question. In the present case the question of whether a genuine issue of material fact exists is complicated by the fact that the trial court did not allow the government the opportunity to formally respond to MGPC's Motion for Summary Judgment. The trial court, therefore, did not have the benefit of opposing affidavits or other documentary evidence to aid it in determining whether a genuine issue of material fact existed.

Because a party has not formally presented opposing evidentiary matter does not, ipso facto, mandate that no genuine issue of material fact exists and that summary judgment be entered for the moving party. Rather the burden is on the moving party to show that no genuine issue exist as to any material fact.

> The party opposing a motion for summary judgment is entitled to have all facts viewed in the light most favorable to it and to all reasonable inferences which may be drawn from the facts. *Standard Oil Co.* v. *Department of Energy*, 596 F.2d 1029, 1065 (TECA 1978). The moving party must show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the nonmoving party has raised by

> pleadings a genuine issue of material fact, and the evidentiary matter in support of the motion for summary judgment does not establish the absence of such issue, summary judgment must be denied even though no opposing evidentiary matter is presented. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 159-160, 90 S.Ct. 1598, 1609-10, 26 L.Ed. 2d 142 (1970); *Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429, 439 (9th Cir. 1979).

McWhirter Distributing Co., Inc. v. *Texaco, Inc.*, 668 F.2d 511, 519 (1981); *See also Pacific Service Stations Co.* v. *Mobil Oil Corp.*, 689 F.2d 1055, 1063-64 (TECA 1980).

If the moving party is able to make out a *prima facie* showing that no genuine issue of material fact exists, the opposing party cannot rest on the allegations in his complaint. Rather, the opposing party must present affidavits and/or other depositions, admission, etc., which set forth the disputed facts, Fed.R.Civ.P. 56(e). Otherwise, the undisputed statements in the movant's support materials are taken as true. *Smith* v. *Saxbe*, 562 F.2d 729, 733 (D.C. Cir. 1977).

The import of the foregoing is that the DOE's failure, whether it be due to the DOE's or the trial court's error, to respond to MGPC's Motion for Summary Judgment does not automatically dictate that the facts, as alleged by MGPC, are true and that MGPC is entitled to judgment as a matter of law. Instead, this court must independently review the record to determine if material issues of facts do exist and if no such issues exist, determine whether MGPC was entitled to judgment as a matter of law. With these principles in mind we focus our attention to the facts at hand.

A. The March 6, 1975 Supplemental Order, together with the May 15, 1975 order, effectively rescinded the 1.5

cents of exception relief awarded to MGPC on November 22, 1974.

The trial court held that the March 6, 1975 Supplemental Order did not terminate or rescind the November 22, 1974 exception relief order. The trial court believed the November 22 order had the force and effect of law. The trial court found, therefore, that it could only be modified by strictly following the procedures established by the November 22 order. More specifically, the court determined that to terminate or rescind the November 22 order, the DOE had to:

> (a) promulgate new Subpart K, (b) notify [MGPC] of its intent to terminate such relief, (c) afford plaintiff [MGPC] of an opportunity to comment on such intent, and (d) to issue a subsequent written order rescinding such relief.

581 F.Supp. at 1064.

It is not disputed that the OEA did not specifically comply with (b), (c), and (d) above.

The error in the trial court's analysis lies in the trial court's confusion as to the difference between administrative agency regulations and administrative agency orders. Administrative agency regulations do have the force and effect of law. See *United States* v. *Nixon,* 418 U.S. 683, 695, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974); *United States* v. *Shaughnessy,* 347 U.S. 260, 265, 74 S.Ct. 499, 502, 98 L.Ed. 681 (1954). Administrative agency orders do not, however, have the force and effect of law unless they have been "unequivocally affirmed by a court of law." *Taunton Municipal Lighting Plant* v. *DOE,* 669 F.2d 710, 715 (TECA, 1982). See also *Placid Oil Company* v. *Federal Power Commission,* 483 F.2d 880, 904 (5th Cir. 1973), aff'd. 417 U.S. 283, 74 S.Ct. 2328, 41 L.Ed.2d 72 (1974). Because the November 22, 1974 order had not been

affirmed by a court of law prior to the time the DOE attempted to terminate or rescind the November 22, 1974 order, the OEA was free to modify it. It is true that the November 22, 1974 order did specify a means by which the order could be terminated. In the present case, however, we can find no prejudice to MGPC as a result of the OEA's failure to specifically comply with the specified means by which the order could be terminated.

We can find no prejudice to MGPC because the procedural protections established in the November order (i.e. advance notice, an opportunity to comment, and a subsequent written order) were effectively preserved in that the DOE, when terminating the exception relief on March 6, 1975, allowed MGPC ten days in which to object to the termination. Further, MGPC was later informed via the May 15, 1975 order that the March 6, 1975 order had become final.[2] As a result MGPC had notice of the termination and had the benefit of a subsequent writing indicating MGPC's objections were not persuasive. We therefore hold that the trial court erred in holding that the November 22, 1974 exception relief order was not terminated by the March 6, 1975 supplemental order. We find, as a matter of law, that the March 6, 1975 order terminated the November 22, 1974 exception relief order which order granted to MGPC 1.5 cents of exception relief.

---

[2] It should be noted that, strictly speaking, that the March 6, 1975 Supplemental Order was issued as a supplement to the November 22, 1974 order and, therefore both orders carried the same case number, FEA-0248. The FEA issued the May 15, 1975 order under the docket number FEA-1393 which was the docket number assigned to MGPC's January 16, 1975 request for exception relief from Subpart K. Although the May 15, 1975 order did not include docket number FEA-0248, it is clear that the May 15, 1975 order refers to the case number FEA-0248. We do not believe, therefore, that the absence of the docket number FEA-0248 from the May 15, 1975 order is of any consequence.

B. The March 6, 1975 and May 15, 1975 orders rescinded the November 22, 1974 exception relief order and voided it ab initio.

Our holding that the March 6, 1974 supplemental order terminated MGPC's entitlement to 1.5 cents of exception relief does not end the inquiry. A question exists whether the exception relief was not simply terminated, but was rescinded in total and thereby terminated MGPC's right to use the 1.5 cents of exception relief retroactively and prospectively from November 22, 1974.

The March 6, 1975 order itself is ambiguous as to whether the November 22, 1974 order was terminated or rescinded. The body of the supplemental order states that the November 22, 1974 order "be terminated" (R. 1573); but the end of the order, states:

IT IS THEREFORE ORDERED THAT:

(1) The order issued by the Federal Energy Administration to the McCulloch Gas Processing Corporation on November 22, 1974 be and hereby is *rescinded.* (Emphasis added).

The ambiguity described above is enhanced by the May 15, 1975 order which, when referring to the termination of the November 22, 1974 exception relief order, states:

> The material which MGPC submitted was not found to be persuasive and as a result the March 6, 1975 order became final and on March 20, 1975 the 1.5 cents per gallon price exception relief previously extended to MGPC was *terminated.* (R. 1940).

In resolving the ambiguity caused by the March 6, 1975 and May 15, 1975 orders we are guided by several principles governing the interpretation of administrative orders. First, agency orders are to be interpreted in the entire context in which they arise. *Condor Operating*

Company v. *Sawhill,* 514 F.2d 351, 361-62 (TECA 1975), *cert. denied* 421 U.S. 976 (1975). Second, Courts owe great deference to the agency's interpretation of its own orders. *Mountain Fuel Supply Co.* v. *Department of Energy,* 656 F.2d 690, 694-95 (TECA 1981) (*Fuel Supply Co.* deals with an agency's interpretation of its own regulations. We can see no reason why the rule of deference should not apply to agency orders as well). This court "need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance." *Beko Petroleum Corporation* v. *Federal Energy Regulatory Commission,* 589 F.2d 680, 685 (D.C. Cir. 1978), citing *United States* v. *Lavionoff,* 431 U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). Finally, administrative orders are not to be given strained and unnatural construction. *Bavron Coop. Creamery* v. *Wickard,* 140 F.2d 485, 488 (7th Cir. 1944) (Cited in *Beko,* 589 F.2d 680 at 689 n.5).

Guided by the principles stated above we approach the facts of this case. First, we must examine the context in which the March 6 and May 15, 1975 orders were issued. The DOE issued the March 6 and May 15, 1975 orders after two unsuccessful attempts to convince MGPC that the 1.5 cents of exception relief granted to MGPC in November of 1974 could not be used in connection with the new Subpart K regulations. The DOE attempts to convince MGPC that MGPC was not entitled to apply the exception relief in connection with Subpart K were: first, the January 15, 1975 letter from Frank Zarb, then Administrator of the FEA, to MGPC that the 1.5 cents of exception relief was no longer relevant in light of the promulgation of the Subpart K regulations (R. 3055); second, the February 19, 1975 OEA response to MGPC's request for relief from the Subpart K regulation in which the OEA implicitly informed MGPC that MGPC was not

entitled to use the 1.5 cents of exception relief in connection with Subpart K. (R. 1764).

The fact that FEA had tried to inform MGPC, prior to the issuance of the March 6, 1975 order, that the FEA did not consider MGPC to be entitled to use the 1.5 cents of exception relief indicates that the DOE wanted to rescind the November 22, 1974 order rather than simply terminate it. After making at least two attempts to convince MGPC that MGPC was not entitled to use the 1.5 cents of exception relief in conjunction with Subpart K, a rescission of the November 22, 1974 order is the more likely intent of the DOE because a rescission would have the desired effect of eliminating any claim of right MGPC had to use the November 22, 1974 exception relief.

In addition to the surrounding circumstances, which indicate a rescission was intended, we have DOE's proffered interpretation of the March 6, 1975 order. While an agency's interpretation of its own order is not conclusive it is entitled to great weight. The DOE's proffered interpretation (that the March 6, 1975 supplemental order rescinded the November 22, 1974 order) of the March 6, and May 15, 1975 orders is, therefore, entitled to great deference. Granting deference to the DOE's interpretation does not result in a strained or unnatural construction.

We realize by holding that the November 22, 1974 order was rendered a complete nullity we hold that MGPC could not apply the 1.5 cents of exception relief retroactively for all of 1974. Denying MGPC the use of the exception relief for any part of 1974 may appear harsh in light of MGPC's projected $764,000 in 1974. It should be acknowledged, however, as the OEA acknowledged in the May 15, 1975 order, that MGPC did not suffer a loss a $764,000 in 1974.

> It should also be noted that there are substantial additional and serious discrepancies between MGPC's projections of its financial and operating posture during 1974 as set forth in the firm's submissions to the FEA on October 29, 1974, and the data which reflects its actual operations as submitted to the FEA on April 21, 1975. In its October 29 projection MGPC underestimated its 1974 processing volume by approximately 15.3 million gallons, or 21 percent of the firm's estimated annual production. MGPC's estimate of its 1974 operating income was also $900,000 less than its actual results, an amount which represents approximately 10 percent of the firm's estimated total revenue for 1974.
>
> In view of MGPC's size, sales revenues, and the fact that the projections at issue were prepared during the tenth month of the fiscal year in question, the degree of error in those projections was very substantial. In the absence of any showing that MGPC has improved its projection techniques, the magnitude of the prior errors undermines the reliability of similar projections as to its 1975 fiscal year which MGPC has provided in support of its present exception application.

(R.1943).

MGPC's lack of unique harm in 1974 supports the DOE's view that the March 6, and May 15, 1974 orders rescinded the November 22, 1974 order in toto.

An additional point of interest is that on August 29, 1975, the FEA issued a "Class Exception" which allowed gas processors to apply minimum base prices and nonproduct pass-through provisions of Subpart K retroactively to August 19, 1973. The Class Exception did not

permit rebilling for the period August 19, 1973 to December 31, 1974, but allowed the processors to bank the price increases and to recover up to 10% of such banked costs per month in determining the maximum lawful selling price prospectively to sales of NGLP's after August 29, 1975. 40 F.R. 40,824 (September 4, 1975). The existence of the "Class Exception" described above does not lend additional support to our holding that the OEA intended to rescind the November 22, 1974 exception relief. The existence of the "Class Exception" does not lend additional support to our holding because the "Class Exception" was issued after the OEA rescinded the November 22, 1974 exception relief order. As a result, the OEA could not have had the "Class Exception" in mind when it made the decision whether to rescind or merely terminate the November 22, 1974 order. Nevertheless, the existence of the additional relief afforded to MGPC as a result of the "Class Exception" would appear to have eliminated any possible hardship MGPC might have suffered during 1974.

For the reasons stated above, we therefore hold that the November 22, 1974 exception relief order was rescinded in toto and thereby denied MGPC use of the exception relief retroactively or prospectively from November 22, 1974.

Our holding that the DOE effectively rescinded the exception relief awarded to MGPC on November 22, 1974 completely resolves the present dispute. We feel compelled, however, to briefly comment upon other issues raised by the parties.

C. The November 22, 1974 exception relief could only be used in connection with the Subpart E.

One such other issue is the DOE's position that the November 22, 1974 exception relief could be used by

MGPC only in conjunction with the Subpart E regulations and not in conjunction with the Subpart K regulations. The DOE finds support for the proposition that the DOE intended the November 22, 1974 order to apply only in conjunction with the Subpart E regulation in the November 22, 1974 order:

> In order to alleviate the serious hardship found to exist the FEA has determined that interim exception relief should be provided at this time pursuant to which MGPC would be permitted *to adjust its May 15, 1973 selling prices for the purposes of Section 212.82* so that if the resulting price increases were apportioned over the course of 1974 MGPC would not have experienced the $764,000 operating loss which it projects it will incur during the 1974 fiscal year. (Emphasis added).

As emphasized in the above excerpt, the November 22, 1974 exception relief order allowed MGPC to adjust its prices for the purposes of 10 C.F.R. § 212.82. 10 C.F.R. § 212.82 is a part of Subpart E. Subpart K, which was later promulgated, is not under Section 212.82. Rather, Subpart K is codified as 10 C.F.R. § 212.161-171.

Were we to feel the need to rule upon the trial court's determination that MGPC could apply the 1.5 cents of exception relief in conjunction with Subpart K we would have to reverse in light of the language of the November 22, 1974 order quoted above. Such a holding would be supported by the DOE's contemporaneous construction of the November 22, 1974 order found in two letters. One such letter is the letter, mentioned above, from Frank Zarb to MGPC in which Zarb stated that in view of the new regulation, "the interim exception relief was no longer relevant". (R. 3055). The other letter is from Richard Tedrow, Deputy Director of the OEA, dated January 13, 1975 in which Tedrow informed MGPC that

since the new regulations had been issued, no further consideration of the interim relief was necessary and that the November 22, 1974 order was considered final (R. 1678). We believe these two letters support the DOE's position that the November 22, 1974 order could only be applied in connection with Subpart E.

D. Did the trial court err in ruling, as a matter of law, that the exception relief awarded to MGPC could be awarded retroactively from November 22, 1974 back to January 1, 1974.

Were it not for our holding that the March 6, 1974 exception relief order was completely rescinded we would have difficulty resolving this issue. The relevant language of the November 22, 1974 order provides:

> In order to alleviate the serious hardship found to exist the FEA has determined that interim exception relief should be provided at this time pursuant to which MGPC would be permitted to adjust its May 15, 1973 selling prices for the purpose of Section 212.82 *so that if the resultant price increases were apportioned over the course of 1974,* MGPC would not have experienced the $764,000 operating loss which it projects it will incur during the 1974 fiscal year. (Emphasis added).

(R. 1572).

The emphasized language appears to the court to be ambiguous as to retroactivity. The trial court relied upon an affidavit of an MGPC attorney in resolving the ambiguity. MGPC's attorney's affidavit stated he had talked with someone at the OEA who told him that MGPC could apply the exception relief anyway MGPC wished. 581 F.Supp. at 1053. We doubt it was proper for the trial court to rely on the above mentioned affidavit to the exclusion of the Tedrow and Zarb letters in ruling on a

motion for summary judgment. Even though the DOE did not file opposing affidavits we do believe the matter involved a factual dispute incapable of resolution on summary judgment. Again, in light of our holdings in this case, we do not need to reach this issue.

Another issue we need not reach is whether or not the trial court erred in holding that the DOE is estopped from claiming that the interim relief was not retroactive (*MGPC, Inc.*, 581 F.Supp. at 1062) and that the relief could not be used in conjunction with Subpart K (*Id.* at 1063-1064). Although we do not need to reach the trial court's holding in regard to estoppel, it should be noted that this court doubts any basis exists in the present case for holding the government estopped.

CONCLUSION

For the reasons stated above we reverse the trial court in full. Because the Department of Energy did not formally move for summary judgment below we would ordinarily remand to the trial court. In the present case, however, we feel it would be just, under the circumstances, to direct the trial court to enter summary judgment for the government.

The source of this court's power to direct the trial court to enter summary judgment for a nonmoving party stems from our jurisdictional statute:

> . . . except as provided in Subsection (d)(2) of this section, the court shall not have the power to issue any interlocutory decree staying or restraining in whole or in part any provisions of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title.

Economic Stabilization Act of 1970 § 211(b)(1), 12 U.S.C. § 1904 note.

Section 2106 of Title 28, U.S.C. provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The power granted by 28 U.S.C. § 2106 to appellate courts to dispose of a case on appeal is broad. While it is seldom appropriate for an appellate court to direct the entry of summary judgment, since such a determination is best left to the trial court, courts have held that 28 U.S.C. § 2106 does give the appellate court the power to do so when it would be just under the circumstances. See *Morgan Guaranty Trust Company of New York* v. *Martin*, 466 F.2d 593, 600 (7th Cir. 1972). The Ninth Circuit, for example, has held:

> Under proper circumstances an appellate court may enter summary judgment for the nonmoving party. *E. C. Ernst, Inc.* v. *General Motors Corporation*, 537 F.2d 105 (5th Cir. 1976); *Morgan Guaranty Trust Co.* v. *Martin*, 466 F.2d 593 (7th Cir. 1972); *Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157 (2d Cir. 1971) aff. sub nom *Kern County Land Co.* v. *Occidental Petroleum Corporation*, 411 U.S. 582, 93 S.Ct. 1736, 36 L.Ed.2d 503 (1973).

Martinez v. *United States of America*, 669 F.2d 568, 570 (9th Cir. 1982).

Under the present circumstances justice requires that this court direct to the trial court to enter summary

judgment on behalf of the nonmoving party because no facts are disputed concerning the March 6, and May 15, 1975 orders (which orders form the basis of our decision). Additionally, the parties have had a full and fair opportunity to brief and argue the interpretation and effect of these two orders. We therefore reverse the trial court in full and remand to the trial court with the direction that the trial court enter summary judgment for the defendant, DOE.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. C79-0279B

MGPC, INC., a Wyoming corporation,
Plaintiff,
vs.
CHARLES DUNCAN, Secretary of the
Department of Energy, et. al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing before the Court upon the Plaintiff's Motion for Summary Judgment and upon Defendants' Motion to Strike, or in the Alternative for Further Discovery, Richard T. Williams, Esq., Blair J. Trautwein, Esq., and David L. Huard, Esq., for the Plaintiff, and Don W. Crockett, Esq., and John L. Gurney, Esq., for the Defendants, and the Court, having heard and considered the arguments of counsel, the pleadings, and the record of administrative proceedings filed with the Court, as well as the depositions taken in this matter, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff is a natural gas processing company, is incorporated under the laws of Wyoming, with offices in Los Angeles, California, and natural gas processing plants and operations in South Dakota, Montana, Texas and Wyoming. Plaintiff purchased "raw" casing-head natural gas under long-term purchase agreements which

often continued in effect for the life of the well from which the gas was purchased. Plaintiff then transported such natural gas through its pipeline facilities to its processing plants, and extracted therefrom natural gas liquid products (NGLPs), primarily propane and butane, for sale to its wholesale customers. Due to the volatility of natural gas prices, and in accordance with historic practices, Plaintiff purchased such gas supplies under "net back" contracts by which the Plaintiff returned to the producer a set percentage of the sales price received for products processed from purchased raw natural gas, rather than using "fixed price" agreements.

That portion of the natural gas not consumed by processing, (referred to as residue gas) was sold by the plaintiff in interstate commerce, and was therefore subject to regulatory control by the Federal Energy Regulatory Commission. The Plaintiff was a "refiner" as that term was used in Department of Energy (DOE) price regulations, 10 C.F.R. Section 212.31, and therefore sales of its NGLPs were subject to the regulatory control of Defendant Department of Energy (DOE) and its predecessor agencies under the Economic Stabilization Act of 1970, 12 U.S.C. Section 1904 NOTE, P.L. 91-379, (ESA) and the Emergency Petroleum Allocation Act of 1973, 14 U.S.C. Section 751 et. seq. (EPAA).

2. Defendant DOE is a federal agency and is charged with the duty and authority to enforce relevant provisions of the ESA and the EPAA and regulations promulgated thereunder. Such authority was initially vested in the Cost of Living Council (CLC) under the provisions of the ESA. It was delegated to the Federal Energy Office (FEO) by Executive Order No. 11,748, 39 F.R. 33,575 (December 6, 1973). After passage of the Federal Energy Administration Act of 1974, 15 U.S.C. Sections 761 et. seq., FEO's rulemaking and enforcement functions on

June 27, 1974 were transferred to the Federal Energy Administration (FEA) by Executive Order No. 11,790, 39 F.R. 185. Such authority was then transferred to Defendant DOE on February 7, 1978 after passage of the Department of Energy Act, 42 U.S.C. Sections 7101 et. seq. by Executive Orders Nos. 12,099, 42 F.R., 46,267 (9-15-77) and 12,038, 43 F.R. 957. Defendant DOE's price control authority was terminated on January 28, 1981 by Executive Order No. 12,287, 46 F.R. 9909. Defendant Duncan at the time of commencement of this action was the Secretary of DOE, and its primary administrator. Defendant Goldstein was the Director of DOE's Office of Hearings and Appeals (OHA). Both remaining individual Defendants were sued in their official capacities only, as officers and employees of Defendant DOE. Their successors have not been substituted as Defendants herein.

3. On June 6, 1974 Plaintiff filed a Petition for Interpretation and Exception with FEA's Office of General Counsel (OGC) and its Office of Exceptions and Appeals (OEA), requesting, in part, an exemption from FEA's NGLP pricing regulations set forth in 10 C.F.R. Section 212.82, or in the alternative requesting exception relief under 10 C.F.R. Section 205.41 et. seq., so as to enable it to charge up to 27.7 cents per gallon weighted average for NGLPs produced by it in its processing plants rather than the applicable ceiling price of approximately 8 cents per gallon permitted under such regulations. FEE-0899. Plaintiff alleged, in part, that the pricing regulations were ill-suited for natural gas processing plants, but rather were designed to govern NGLPs produced from crude oil by crude oil refiners, and that the effect of the price regulations was to lock natural gas processors in at their May 15, 1973 base prices in computing maximum lawful selling prices (MLSPs) for NGLPs since the historical practice of using net-back supply contracts effectively

precluded them from incurring and passing through increased product costs. Plaintiff alleged that integrated crude oil refiners, such as its primary competitor for new supplies of natural gas, Phillips Petroleum Company, could average prices for NGLPs, whether produced from crude oil or natural gas, and thus could pass through increased product costs for crude oil in computing MLSPs for their NGLPs. Plaintiff claimed that such crude oil refiners, which also used net-back contracts in purchasing new natural gas supplies, were therefore able to pay producers up to three times as much as natural gas processors could for new gas supplies. Plaintiff further alleged that it had rapidly declining natural gas reserves, due in part to the rapid depletion rates common in the Powder River Basin, and that its inability to obtain new supplies of natural gas forced it to operate its facilities at substantially less than 100% capacity, resulting in substantial operating losses the magnitude of which were growing as its then current supplies, and thus its volumes of production, decreased. It claimed that it would have to charge 27.7 cents per gallon weighted average for NGPLs produced at its facilities at then current volumes in order to cover its operating costs, obtain new supplies, and provide an adequate return on investment (approximately 6%) on its capital facilities and therefore sought exception relief allowing it to charge up to that amount.

4. On September 10, 1974 FEA proposed new Subpart K to Part 212 of its pricing regulations, 10 C.F.R. Section 212.64 et. seq. (Subpart K) 39 F.R. 32717 (9-10-74). Subpart K was to specifically address unique considerations concerning MLSPs for NGLPs produced from natural gas streams rather than from crude oil, which FEA conceded were not adequately dealt with under the original pricing regulations governing NGLPs contained in Subpart E to Part 212, 10 C.F.R. Section 212.83 et. seq.

(Subpart E). In the preamble to such proposed rulemaking FEA acknowledged the plight of all natural gas processors, including the Plaintiff, and the severe financial burden imposed upon them by the provisions of Subpart E. The preamble admitted that the previous provisions were ill-suited for the operations of natural gas processors, and had the effect of limiting them to May 15, 1973 base prices in computing MLSPs for their NGLPs. The preamble noted the fact that the regulations created pricing disparities as between natural gas processing plants and crude oil refiners, giving the latter a competitive advantage in obtaining new natural gas supplies under net back supply contracts, which were commonly used throughout the industry, and therefore threatened to impose substantial injury upon natural gas processors if not remedied.

5. On September 12, 1983 FEA denied Plaintiff's request for exception relief in FEA-0899 on the ground that the Plaintiff had failed to substantiate its claim that it was incurring substantial hardship or gross inequity as a result of the provisions of Subpart E. Such Decision and Order proposed that the Plaintiff could cure its financial hardships by altering its mode of acquiring new natural gas supplies by using fixed price supply contracts rather than traditional net-back arrangements.

6. Plaintiff appealed the Decision and Order of FEE-0899 in FEA-248. Plaintiff sought a stay of the applicability of Subpart E to its operations pending a decision in FEA-248, which was denied. FES-248. On November 22, 1974 FEA's Office of Hearings and Appeals (OHA) issued a Decision and Order which reversed the denial of relief in FEE-0899, and which granted Plaintiff's request in part, allowing Plaintiff to price its NGLPs in such a way that its weighted average selling price for all NGLPs sold by it would be its MLSP under applicable pricing

regulations, plus no more than 1.5 cent per gallon. *McCulloch Gas Processing Corp.,* CCH Federal Energy Guidelines Par. 20,186 (11-22-1974).

7. On December 19, 1974 FEA adopted new Subpart K, effective January 1, 1974. 39 F.R. 44,407 (12-24-74). Between November 22, 1974 and January 10, 1975 Plaintiff's Washington, D.C. counsel, Joe W. Fleming, contacted FEA's highest ranking officials in its national office in Washington, D.C., requesting them to instruct the Plaintiff as to how it could apply the 1.5 cent per gallon relief, as this matter was not specifically set forth in the Decision and Order in FEA-248. Mr. Fleming initially believed that the relief was only prospective in nature, and felt that it was grossly inadequate for this reason. However, he was then instructed by FEA's personnel that the relief was retroactive in nature, and that the Plaintiff could use the relief to justify all of its selling prices for 1974, and could rebill its customers if it so desired, or could bank the relief and recapture it in computing future MLSPs for its NGLPs. Mr. Fleming was further instructed that the relief would continue into 1975 and could be used in conjunction with the relief granted by Subpart K, and that such relief would continue in effect until terminated in compliance with the terms of the November 22, 1974 Decision and Order.

8. On January 10, 1975 FEA's Administrator Frank G. Zarb, General Counsel Robert Montgomery, and Assistant Administrator Duke Ligon met with several of the Plaintiff's officers and employees, including its president C. V. Woods, its house counsel Franklin P. Dodge, its retained Washington D.C. counsel Joe W. Fleming, and its current president H. C. Ouzts, concerning the application and effect of the 1.5 cent per gallon relief in conjunction with the additional relief provided under new Subpart K. During the course of such meeting the FEA

officials informed the Plaintiff that it could apply the 1.5 cent per gallon relief retroactively for all of 1974, and prospectively in conjunction with the relief provided by new Subpart K until terminated in compliance with the terms of the November 22, 1974 Decision and Order. In addition Peter Luedtke, FEA's Assistant General Counsel, informed Plaintiff's accountants, Arthur Young and Company, on three separate occasions in March of 1975 that this was the proper construction of the 1.5 cent per gallon relief. Between January 10, 1975 and February 24, 1975 various representatives of FEA in its Region VIII and Region IX offices similarly confirmed that this was the proper construction of the 1.5 cent per gallon relief. Arthur Young and Company, in part in reliance upon such representations, allowed the Plaintiff to terminate a financial reserve previously required by it due to the Plaintiff's pricing problems under Subpart E and due to the confusion surrounding the computations of Plaintiff's MLSPs under the provisions of Subpart E.

9. On January 13, 1975 Plaintiff filed a Petition for Exception Relief from the provisions of new Subpart K. FEE-1393. In conjunction with such petition Plaintiff filed various price computations reflecting its understanding that the 1.5 cent per gallon relief could be applied in conjunction with the provisions of Subpart K. On March 20, 1975 Franklin Dodge wrote Melvin Goldstein in response to an Order issued March 6, 1975 which sought to terminate the 1.5 cent per gallon relief, and in such letter expressly stated Plaintiff's understanding that the 1.5 cent per gallon relief could be applied retroactively for the year 1974, as well as prospectively. Neither of these representations were disputed nor objected to by FEA.

10. On January 13, 1975 Richard Tedrow, an auditor for FEA wrote Plaintiff's president R. L. Cook, stating that the 1.5 cent per gallon relief was automatically

terminated upon the issuance of new Subpart K, and inviting the Plaintiff to seek exception relief from the provision of Subpart K if it continued to suffer substantial hardship or gross inequity. That letter contradicted the language of the November 22, 1974 Decision and Order which stated the relief would continue in effect after the issuance of the new regulations and until terminated after notice and an opportunity to comment. The letter did not inform the Plaintiff of FEA's intent to terminate such relief and did not invite the Plaintiff to comment upon such intention.

11. On January 15, 1975 Mr. Zarb sent a letter to Mr. M. M. Witte, vice chairman of the board of MIGC, a sister corporation of the Plaintiff which was purchasing a portion of the Plaintiff's residue gas production, in response to Mr. Witte's letter of December 6, 1974 to Mr. Zarb's predecessor in office, John C. Sawhill. The December 6, 1974 letter complained to FEA stating that the 1.5 cent per gallon was inadequate to remedy the substantial financial hardship suffered by the Plaintiff under Subpart E. Mr. Zarb noted that new Subpart K remedied many of the alleged hardships suffered by the Plaintiff, and concluded that the Plaintiff's hardship under Subpart E and the inadequacy of the 1.5 cent per gallon relief were no longer relevent questions. He said that the Plaintiff should file for exception relief from the provisions of Subpart K, should the additional relief fail to adequately remedy such hardship. Neither this letter, nor a separate letter from FEA to Plaintiff dated January 2, 1975 denying further exception relief in FEA-248, addressed the question of whether the 1.5 cent per gallon relief could be applied in conjunction with Subpart K, or whether it was terminated upon the adoption of new Subpart K. Furthermore, neither of the letters informed Plaintiff of FEA's intent to terminate the 1.5 cent per gallon relief nor invited the Plaintiff to comment upon such a proposal.

12. On January 16, 1975 FEA's Region VIII Office, following proceedings in which FEA national office personnel participated actively, issued a Remedial Order requiring Plaintiff continue to sell a specified part of its propane production to Hidrogas Inc., its base period purchaser, under FEA allocation regulations. That Remedial Order computed Plaintiff's MLSPs for propane, and in doing so included the 1.5 cent per gallon relief in addition to the additional relief provided under Subpart K. While the Remedial Order limits the effect of such computation, referring to it as an assumed MLSP, such limitations concerned the accuracy of the data provided by the Plaintiff concerning its May 15, 1973 base period prices and its nonproduct cost increases since the effective date of relevant pricing regulations rather than the elements included in the computations, including the use of the 1.5 cent per gallon relief. On January 27, 1975 FEA's Region IX office issued an audit report and Proposed Remedial Order (PRO) which also permitted the Plaintiff to use the 1.5 cent per gallon relief in conjunction with the additional relief provided by Subpart K. However, the PRO, contrary to the representations made by FEA's officials from its national office, alleged that the 1.5 cent per gallon relief was prospective in nature and could not be used to justify selling prices prior to November 22, 1974. In response to these inconsistent representations, as well as to other considerations, Plaintiff on January 13, 1975 filed Civil Action No. CV 75-99F, and on January 20, 1975 filed Civil Action No. CV 75-202 WPG, both in the United States District Court for the Central District of California, seeking declaratory and injunctive relief against FEA and various of its officers and employees. Such actions, in part, alleged that the 1.5 cents per gallon relief was retroactive in effect, and requested the Court to so construe such relief, and to enjoin FEA and its officers and employees from taking an inconsistent

position in any enforcement proceedings. Plaintiff also alleged that the 1.5 cent per gallon relief was unreasonably low in amount and requested the Court to order FEA to grant Plaintiff more substantial relief.

13. Between February 5, 1975 and February 24, 1975 FEA's Region IX office conducted proceedings concerning Plaintiff's objections to the PRO issued January 27, 1975. Throughout the course of such proceedings FEA's Region IX personnel, including Phillip Naideth, Herbert Schreiber, and national office personnel, including Stewart Stone of FEA's Office of General Counsel (OGC), and Ezra Levine, consistently represented to the Plaintiff that the 1.5 cent per gallon relief could be applied in conjunction with the additional relief provided by Subpart K. On February 24, 1975 Region IX reversed and dismissed the PRO issued January 27, 1975 on grounds not relevant to the application of 1.5 cent per gallon relief. However, language in such order reaffirmed FEA's position that Plaintiff could apply the 1.5 cent per gallon relief in conjunction to the relief provided by Subpart K. In addition, correspondence between Zarb, Gorman Smith, Acting Assistant Director of Regulatory Programs of FEA's national office, and Kenneth Merica, and Dudley Faver, both of FEA's Region VIII office, between February and April of 1975 indicated that at that time FEA believed that the Plaintiff could "piggyback" such relief.

14. On March 3, 1975 H. W. Lemens, Inc., a purchaser of NGLPs from Plaintiff, complained to FEA concerning the fact that Plaintiff was continuing to use the 1.5 cent per gallon relief in conjunction with its pricing under Subpart K, and also complained about the fact that market prices for NGLPs had skyrocketed and were thereby imposing substantial burdens upon wholesalers and consumers of such products.

15. On March 6, 1975 FEA reopened FEA-248, which was on review before the United States District Court for the Central District of California, and issued a Supplemental Order concerning the 1.5 cent per gallon relief, stating that due to the additional relief provided by new Subpart K the 1.5 cent per gallon relief was no longer needed by the Plaintiff. That order stated that the relief granted in FEA-248 was only applicable to Plaintiff's pricing under Subpart E, and that the 1.5 cent per gallon relief could not be applied in conjunction with pricing under Subpart K. The order purported to terminate the exception relief effective January 1, 1974. On March 20, 1975 Plaintiff timely filed a substantial amount of materials with FEA alleging that the relief provided under Subpart K was inadequate to remedy the substantial losses in revenue and in new natural gas reserves incurred by the Plaintiff prior to its adoption, since it was only prospective in effect, and that therefore the 1.5 cent per gallon relief was still needed to enable the Plaintiff to recapture the market position it held prior to the imposition of pricing regulations upon its operations, as opposed to Phillips Petroleum. FEA and its successor agencies never responded to these materials, and never issued a formal written order subsequent to March 6, 1975 which finalized the termination of the 1.5 cent per gallon relief. At no point prior to March 6, 1974 did FEA notify Plaintiff that it intended to terminate the exception relief or invite Plaintiff to comment on such intent. DOE now claims that ten days after service of the Supplemental Order upon Plaintiff, FEA determined that the materials filed were not adequate to "show cause" and terminated the exception relief effective January 1, 1975. The supplemented record indicates that between February and March of 1974 there was a substantial amount of debate within FEA as to whether or not the exception relief

granted under Subpart K was automatically terminated upon issuance of new Subpart K.

16. On May 23, 1975 FEA issued Ruling No. 1975-6, which gave the "shrinkage" provisions of Subpart K retroactive effect for the time period from August 19, 1973 to December 31, 1974. 40 F.R. 23,272 (May 29, 1975). On August 29, 1975 FEA issued the "Class Exception", 40 F.R. 40,824 (September 4, 1975), which allowed natural gas processors to apply minimum base prices and nonproduct cost pass-through provisions of Subpart K retroactively for such period as well. Neither the Ruling nor the "Class exception" permitted rebilling of purchasers for such period, but rather allowed natural gas processors to bank the price increases resulting therefrom as unrecovered operating costs, and to recover up to 10% of such banked costs per month in determining MLSPs prospectively to sales of NGLPs after August 29, 1975. Nowhere does the Ruling in the Class Exception state that its relief is exclusive of any relief given by FEA previously. Neither does Subpart K state that relief provided thereby is exclusive of all other relief provided previously by FEA. FEA concedes that Ruling 1975-6 may be applied in conjunction with pricing under Subpart E, but FEA alleges that the Class Exception is exclusive of any relief provided by FEA during the time period prior to January 1, 1975, since such relief states that it is made applicable only "to the extent that" Subpart K applies to a processors operations. However, the language in such ruling merely makes clear the fact that pricing relief provided thereby is available to integrated petroleum refining companies only to the extent that they process NGLPs from natural gas streams, and does not address the question whether or not such relief is exclusive from any other relief provided previously by FEA.

17. Between August 29, 1975 and September 19, 1975 Plaintiff's representatives inquired of FEA concerning computation of MLSPs under the provisions of the Class Exception. During such inquiries FEA representatives informed Plaintiff that it could apply the 1.5 cent per gallon relief in conjunction with the additional relief provided by the Class Exception. Plaintiff, in part reliance upon such representations, dismissed the two civil actions filed against FEA in the United Stated District Court for the Central District of California. In addition Plaintiff, in reliance upon such representations, included the 1.5 cent per gallon relief in computing its MLSPs for 1974 under the Class Exception. In reliance upon these representations made by FEA, and the terms of the November 22, 1974 Decision and Order, and upon FEA's failure to comply with the terms of such Order in seeking to terminate the exception relief, as well as FEA's failure to respond to the evidence submitted by the Plaintiff on March 20, 1975, Plaintiff continued to apply the 1.5 cent per gallon relief in conjunction with the provisions of Subpart K until DOE's price control authority was terminated on January 30, 1981.

18. On January 1, 1976 Kenneth Merica, Compliance Director of DOE's region VIII, commenced an audit of the Plaintiff's books concerning prices charged for NGLPs from August 19, 1973 to February 28, 1975. Merica, along with Sidney Ward of DOE's Region VIII Office, completed the audit on Decmeber 12, 1977. In the audit DOE's Region VIII representatives construed the 1.5 cent per gallon relief as being applicable only to pricing under Subpart E, and therefore as not being applicable in conjunction with Plaintiff's pricing under Subpart K, nor under the Class Exception. The audit concludes that the relief is not applicable to any of the Plaintiff's pricing, but rather was in effect superseded by the provisions of Subpart K and the Class Exception. The

audit also states that, in any event, the relief granted November 22, 1974 was prospective and could not be used to justify selling prices prior to November 22, 1974. The audit also states that the relief provided by Subpart K and the Class Exception was elective in nature, and could be used by the Plaintiff only if it agreed to surrender the benefits of the 1.5 cent per gallon relief. The audit concludes that Plaintiff, to the extent it applied the 1.5 cent per gallon relief in conjunction with the relief provided by Subpart K and the Class Exception overcharged its customers for NGLPs and violated applicable pricing regulations. On January 27, 1978 Region VIII on this and several other bases issued a Notice of Probable Violation (NOPV) alleging Plaintiff accumulated over $3,000,000 in overcharges during the time period from August 19, 1973 to February 28, 1975. On March 31, 1978 Plaintiff replied to the NOPV. On January 26, 1979 DOE's Region VIII office issued a PRO generally incorporating the allegations and analysis contained in the NOPV and audit, and ordering the Plaintiff to make restitution for overcharges in the amount of $3,773,938.30 to customers, with interest from the date of the alleged overcharge. On February 8, 1979 and on February 28, 1979 Plaintiff filed objections to the PRO which matter is still pending before DOE in OHA Case No. DRO-177 (831VOO16).

19. Plaintiff alleges that the audit, NOPV, and PRO are unfounded and unreasonable to the extent that they (a) conclude that the 1.5 cent per gallon relief granted by the Decision and Order of November 22, 1974 was not retroactive for the calendar year of 1974 nor prospective into 1975 until terminated in compliance with the terms of such Decision and Order, and (b) conclude that the 1.5 cent per gallon relief cannot be applied in conjunction with the additional relief provided by Subpart K and the Class exception. In addition Plaintiff claims that the 1.5 cent per gallon relief was unreasonably low in light of the

facts known to and considered by FEA at the time that FEA-248 was decided in that the amount failed to address the Plaintiff's fundamental contention that it could not compete for new natural gas supplies due to net back supply contract arrangements unless it was able to charge at least 20 cents per gallon weighted average for its NGLPs. Finally, Plaintiff contends that DOE, and its predecessor agencies, failed to effectively terminate the 1.5 cent per gallon exception relief in compliance with the terms of the November 22, 1974 Decision and Order because they never gave Plaintiff prior notice of intent to terminate the relief nor an opportunity to respond prior to the issuance of the March 6, 1975 Supplemental Order, and they never replied to the materials filed by the Plaintiff on March 20, 1975 in response to such Supplemental Order.

20. Plaintiff requested the Court to:

(a) construe the November 22, 1974 Decision and Order and to declare that it permitted Plaintiff to apply the 1.5 cent per gallon relief retroactively to justify MLSPs for all of calendar year 1974, and prospectively into 1975 until effectively terminated in compliance with the provisions of the November 22, 1974 Decision and Order;

(b) construe such Decision and Order and declare that the 1.5 cent per gallon relief could be applied in conjunction with the additioinal relief provided by Subpart K and the Class Exception;

(c) declare that the 1.5 cent per gallon relief was never effectively terminated by DOE or its predecessor agencies in compliance with the terms of the November 22, 1974 decision and Order, and therefore that it continued in effect until January 30, 1981 when DOE's price control powers were terminated;

(d) issue a permanent injunction against DOE, and its officers and employees, constraining them from issuing any decision or order, or from otherwise proceeding in any manner not consistent with the declarations of the Court set forth in Paragraph 20 (a) through (c) above; and,

(e) declare that the 1.5 cent per gallon amount of relief was unreasonable low under the circumstances, arbitrary, capricious, and not supported by substantial evidence in the record read as a whole, and to therefore remand this matter to DOE for further proceedings to determine what greater amount should have been awarded, pursuant to *McCulloch Gas Processing Corporation v. DOE,* 498 F.Supp. 194 (D. Wyo. 1979).

21. Plaintiff filed a Motion for Summary Judgment, with supporting affidavits, attachments, and memorandum of law on September 7, 1982. Defendants in response thereto filed a Motion to Strike, or in the Alternative for Additional Discovery under Federal Rule of Civil Prodedure 56(f). Upon reviewing the pleadings, the Administrative Records filed with the Court herein, the depositions filed with the Court herein, and the materials filed with the Court along with the various motions, the Court has determined that there is no genuinely disputed material fact, and that disposition of this matter upon the Plaintiff's Motion for Summary Judgment is appropriate. *Standard Oil Co. v. DOE,* 596 F2d 1029, 1065 (TECA 1978); *Roberts v. Morton,* 549 F2d 158, 160 (10th Cir. 1977), cert. den. 434 U.S. 834 (1977).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this proceeding under 42 U.S.C. Section 7192, and 12 U.S.C. Section 1904 NOTE Sections 210 and

211, incorporated by reference in 15 U.S.C. Section 754 (a)(1). Venue is properly in the United States District Court for the District of Wyoming.

2. Plaintiff herein requests the Court to enjoin and set aside agency action of Defendant DOE. Therefore, this Court must determine, based upon the administrative record before the agency, whether the Defendants' findings are supported by substantial evidence, based upon the record as a whole; and whether the agency action was in excess of agency authority, was arbitrary and capricious, or was otherwise unlawful. 12 U.S.C. Section 1904 NOTE Section 211(d), incorporating by reference 5 U.S.C. Section 706(2); *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Pasco, Inc. v. FEA,* 525 F2d 1391, 1404 (TECA 1975); *Nickol v. United States,* 501 F2d 1389 (10th Cir. 1974). However, such review is upon the whole record, and therefore the Court may supplement the record submitted by the agency with matters which were omitted therefrom, but which were considered, either directly or indirectly, by the agency in rendering its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971); *United States v. Carco Bianchi & Co., Inc.,* 373 U.S. 709, 715 (1963); *Marathon Oil Co. v. DOE,* 642 F2d 436, 439 (TECA 1981); *Hiatt Grain and Feed, Inc. v. Bergland,* 446 F.Supp. 457 (D.Kan. 1978), aff'd 602 F2d 929 (10th Cir. 1979), cert. den. 444 U.S. 1073 (1980); *Exxon Corp. v. DOE,* 91 F.R.D. 26, 32-33 (N.D. Tex. 1981). In conducting its review the Court must make a careful, searching review of the record, and then determine whether a reasonable mind could conscientiously conclude that the agency decision was reasonable in light of all of the evidence present in the record. *Greater Boston Tel. Corp. v. FCC,* 444 F2d 841, 850 (1st Cir. 1970), cert. den. 403 U.S. 923 (1971); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938); *Diamond Ring Ranch, Inc. v. Morton,* 531 F2d 1397, 1404 (10th Cir. 1976); *Atlantic*

Richfield Co. v. FEA, 429 F.Supp. 1052 (N.D. Cal. 1976), aff'd 556 F2d 542 (TECA 1977); *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

3. On September 7, 1982 Plaintiff filed a Motion for Summary Judgment with supporting affidavits of Richard T. Williams, Esq., Plaintiff's counsel in the proceedings before this Court; C. V. Woods, who at all times relevant to these proceedings was the president of Plaintiff's parent corporation, McCulloch Oil Corporation; Franklin P. Dodge, Esq., who was Plaintiff's house counsel, and senior attorney for McCulloch Oil Corporation at all times relevant to these proceedings; Joe W. Fleming, II, Esq., who was Plaintiff's retained counsel in Washington, D. C. for the purposes of relevant administrative proceedings before FEA's national office; and H. C. Ouzts, who at all relevant times was, and still is, Plaintiff's president. In compliance with Rule 56(e) of the *Federal Rules of Civil Procedure* sworn copies of all papers or parts thereof referred to in such affidavits were attached thereto and served therewith. Where the movant establishes that there is no genuinely disputed issue as to any material fact, a Motion for Summary Judgment is an appropriate vehicle for the disposition of a case calling for the review of adminstrative action upon the record. *Standard Oil Co. v. DOE,* 596 F2d 1029, 1065 (TECA 1978); *Roberts v. Morton*, 549 F2d 158, 160 (10th Cir. 1976), cert. den. 434 U.S. 834 (1977); *Nickol v. United States,* 501 F2d 1389, 1390-1391 (10th Cir. 1974).

4. On October 5, 1982 this Court upon Defendants' motion issued an Order extending the time within which Defendants could respond to Plaintiff's Motion for Summary Judgment to October 31, 1982. On November 5, 1982 Defendants filed a Motion to Strike all Proffered Evidence, or in the Alternative Motion for Leave to Take Discovery in accordance with Rule 56(f), on the ground

that certain materials set forth in Plaintiff's materials filed in support of its Motion for Summary Judgment were not relevant to determination of the issues before the Court in that such materials were not considered, directly or indirectly, by the Defendants in rendering the decisions brought before this Court for review. A party may, under Rule 12(f) of the *Federal Rules of Civil Procedure* request the Court to strike matters contained in an affidavit filed in support of a motion for summary judgment upon the grounds that such materials would be inadmissible at trial, in that they are allegedly irrelevant. *Apco Inc. v. Carter,* 573 F2d 1268 (TECA 1978), cert. den. 437 U.S. 904 (1978); *Noblett v. General Electric Credit Corp.,* 400 F2d 442, 445 (10th Cir. 1968), cert. den. 393 U.S. 935 (1968); *Wright, Miller and Kane: Civil Practice and Procedure,* Civil 2d, Section 2738 pp. 470-508. However, the Court will simply disregard those matters stricken from the affidavit, while considering the remainder of such affidavits and shall not require the movant to refile the affidavit omitting therefrom the objectionable materials. *Lee v. National Life Assn. Co.,* 632 F2d 524 (5th Cir. 1980); *United States v. Alessi,* 599 F2d 513, 515 (2d Cir. 1979); *Skelly Oil Co. v. FEA,* 448 F.Supp. 16 (D. Okla. 1977); aff'd 581 F2d 838 (TECA 1978), cert. den. sub nom *Getty Oil Co. v. DOE,* 439 U.S. 1070 (197(); *Dickheiser v. Pennsylvania R. Co.,* 5 FRD 5, (E.D. Pa. 1945), aff'd 155 F2d 266 (3rd Cir. 1946), cert. den. 329 U.S. 808 (1946); *Wright, Miller and Kane, supra,* Section 2738 pp. 509-510. Therefore a Motion to Strike, in order to be effective, must set forth the objectionable portions of the affidavit and the grounds for the objection, as was done in this case. *Perma Research and Dev. Co. v. Singer Co.,* 410 F2d 572, 579 (2d Cir. 1969); *Wright, Miller and Kane, supra,* Section 2739 p. 511. But, in an administrative review involving complex and technical issues, the Court may admit voluminous information not contained in

the administrative record, and may review the same in order to aid it in understanding the issues presented, to give the Court a background and basis upon which the Court may better evaluate the evidence contained in the record, and to help the Court in determining the adequacy of the record submitted by the agency. *Hiatt Grain and Feed, Inc. v. Bergland, supra.* The Court may then disregard those materials submitted which are not relevant to determination of the merits of the issue presented to the Court, and not rely upon them in rendering its final decision upon the merits. *Id.* Plaintiff concedes in its reply to the Defendants' Motion to Strike that much of the material submitted along with its Motion for Summary Judgment was intended to aid the Court in understanding the issues presented herein, and should not be relied upon by the Court in rendering its decision upon the merits in this proceeding. Within the context of a review of an administrative record, the Defendants have failed to persuade the Court that there is a reasonable basis for requiring that such material should be stricken from the Plaintiff's supporting affidavits.

5. Defendants' Rule 56(f) Motion primarily seeks to enable the Defendants to respond to the background materials submitted by the Plaintiff in support of its Motion for Summary Judgment. Since such matters are not at issue here, and since such materials will not be considered by the Court in rendering its judgment upon the merits in this proceeding, such discovery would serve no useful purpose, and should be denied. Defendants also seek further discovery concerning issues which were initially raised by the Plaintiff in its original and in its amended, complaint. Such discovery concerns representations which Plaintiff has alleged were made by FEA officials concerning the proper application and effect of the exception relief granted to the Plaintiff in FEA-248. Plaintiff has submitted affidavits of several undeniably

credible persons setting forth the content of such representations. In response Defendants deny knowledge of the content of such meetings. While Defendants' records show that such meetings did in fact transpire, they have failed to produce any minutes or counter-affidavits or other material indicating that the Plaintiff's version of what transpired was inaccurate. The officials who participated in such meetings now deny present recollection of them which does not mean that Plaintiff's version is untrue but only means they do not recall the facts. The Defendants' claim of ignorance is not adequate to show that there is a genuinely disputed issue as to material fact such as would preclude the Court from granting Plaintiff's Motion for Summary Judgment. *Wright, Miller and Kane, supra,* Section 2741 p. 562. Where, as here, the Defendants have had an adequate opportunity to pursue discovery on these issues, a Rule 56(f) motion should be denied. *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253 (1968) ; *Wright, Miller and Kane, supra,* Section 2471 pp. 541-562. Since Defendants allege they have no documentary evidence concerning what transpired at these meetings, and since the relevant officials and employees all deny present recollection of what transpired in such meetings, it seems clear that further discovery on this question would not lead to further admissible evidence that would aid the Court in rendering its decision herein. Therefore Defendants' Rule 56(f) motion should be denied. *Id.*

6. Defendants did not comply with the requirements of Rule 56(e) of the *Federal Rules of Civil Procedure* in that they did not respond to the allegations contained in affidavits and supporting materials filed by the Plaintiff in support of its Motion for Summary Judgment, but rather relied upon the general allegations contained in their pleadings filed herein. *Ottenson v. United States,* 622 F2d 516, 520 (10th Cir. 1980); *Gates v. Ford Motor Co.,*

494 F2d 458 (10th Cir. 1974); *Brown v. Ford Motor Co.,* 494 F2d 418 (10th Cir. 1974). The Defendants also did not comply with Local Rule 6(b) and the Order of this Court in that they failed to file a brief in opposition to the Plaintiff's Motion for Summary Judgment within the extended time period. Plaintiff has adequately established that there are no genuinely disputed issues as to any material facts, and the Defendants have denied but have not shown facts to the contrary to rebut this showing. Thus, the Court must consider the relevant matters set forth in the Plaintiff's supporting affidavits to be established as alleged by the Plaintiff. *Casper v. Neubert,* 489 F2d 543 (10th Cir. 1973).

7. The Court is authorized to issue declaratory relief and injunctive relief should it find that the Defendants' conduct violated the standards set forth in 12 USC Section 1904 NOTE Section 211(d) and 5 U.S.C. Section 706(2). 12 U.S.C. Section 1904 NOTE Section 210(a), 28 U.S.C. Section 2201 (1982). It is undisputed that the Plaintiff is currently subject to a PRO issued by Defendant DOE ordering it to make restitution to its wholesale purchasers for alleged overcharges. Thus, should the Plaintiff prevail upon the merits herein, it has adequately established irreparable injury so as to justify injunctive relief. *Otero Savings and Loan Assn v. F.R.B.,* 665 F2d 275, 278 (10th Cir. 1981); *Studebaker Corp. v. Glitten,* 360 F2d 692, 698 (2d Cir. 1966); *Ohio Oil Co. v. Conway,* 279 U.S. 813, 815 (1929) (per curiam); *Nelson v. Likins,* 389 F.Supp. 1234, 1237 (D.Minn. 1974).

8. The Court, when determining whether pricing regulations issued by a regulatory agency are unreasonably low, does not review the formula used by the agency, but rather must determine whether the end result, i.e., the price established, was or was not compensatory. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), reh. den. sub

nom; *Bass v. FPC,* 392 U.S. 917 (1968). Were the Court to review the Defendants' computation of the 1.5 cent per gallon amount in a vacuum it could readily conclude that the amount was arbitrary and capricious because it failed to address the Plaintiff's supply problems, would have compelled the Plaintiff to incur substantial losses in the future, and would have eventually forced the Plaintiff out of business. However, several surrounding circumstances persuade the Court to conclude that the determination made by the Defendants was reasonable: Such relief was deemed to be "interim" in nature, pending issuance of new Subpart K. The 1.5 cent per gallon amount was computed, based upon data submitted by the Plaintiff, to generate $766,800 in additional revenues so as to (in light of Plaintiff's average 28% net-back commitment to suppliers, and at the current volumes of production, estimated to be 71 million gallons for 1974) eliminate Plaintiff's operating losses (projected to be $764,000) for 1974. Such relief was not intended to address Plaintiff's more fundamental supply problems. The Decision and Order in FEA-248 recognized the fact that new Subpart K had previously been proposed, was currently pending before the agency, and would probably be adopted in its final form within a very short time period. The Decision and Order also recognizes the fact that such new regulations were designed to remedy the supply problems facing natural gas processing plant operators such as the Plaintiff, and then concluded that it would be premature to address Plaintiff's more fundamental contentions, and to thereby discriminate in the Plaintiff's favor as opposed to other natural gas processors which were similarly situated. FEA believed at the time it issued the Decision and Order in FEA-248 that the 1.5 cent per gallon relief would eliminate Plaintiff's 1974 operating losses (as well as its ongoing operating losses in 1975 should Subpart K not be adopted previously) and that the new pricing rules,

when issued, would put an end to Plaintiff's more fundamental supply and volume problems. In light of the information before FEA at the time that the Decision and Order was issued, this determination was a reasonable one. Therefore, the Court will not remand this matter for further proceedings concerning what, if any, greater amount of relief should have been granted Plaintiff in FEA-248.

9. The 1.5 cent per gallon exception relief granted in FEA-248 was retroactive, and therefore could be used to justify Plaintiff's MLSPs and NGLPs sold for all of 1974. The language of the Decision and Order in FEA-248 is ambiguous, because it failed to explain how the 1.5 cent per gallon relief was to be applied, and further failed to define with specificity whether the relief was prospective, or whether rather it was retroactive for the year 1974, or for some other time period. Defendants now claim that the relief was prospective only.

Generally, a Court will defer to an agency's construction of its own regulation or order. *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965); *Mountain Fuel Supply Co. v. DOE,* 656 F2d 690, 694-695 (TECA 1981); *Grigsby v. DOE,* 585 F2d 1069, 1074-1075 (TECA 1978); *Jicarilla Apache Tribe v. FERC,* 578 F2d 289, 292-293 (10th Cir. 1978). However, this is not a hard and fast rule of law, and the Court may overrule an agency's construction of its own regulation or order where such construction is plainly erroneous or inconsistent with agency regulations or orders. *Skidmore v. Swift and Co.,* 323 U.S. 134, 140 (1944); *Standard Oil Co. v. DOE,* 596 F2d 1029, 1055-1056 (TECA 1978). The Court will exercise less deference where the agency's construction is not a long-standing one, and need not defer to the agency's construction where it is inconsistent with earlier pronouncements made by the agency. *Id., Bowles v. Seminole Rock Co. and Sand,* 325 U.S. 410, 413-

414 (1945). This is especially true where, as here, the agency's current position would subject the Plaintiff to the substantial burden of incurring penalties due to the Defendants' retroactive change in its construction of the Decision and Order in FEA-248. *Skidmore v. Swift and Co., supra* at p. 40; *Mountain Fuel Supply Co. v. DOE, supra* at p. 1056 (Jameson, J. dissenting). That, after all these years, would be inequitable.

Furthermore, the orginal construction of the Decision and Order in FEA-128 by FEA's highest ranking officials in its national office, and its Region VIII and Region IX Offices, constitute contemporaneous constructions of such Decision and Order by its draftsmen, which are more persuasive concerning the proper meaning of such Decision and Order than the agency's present construction. *Standard Oil Co. v. DOE, supra.* In light of the contemporaneous construction given the Decision and Order by FEA's highest ranking officials, and in light of the fact that the Defendants' current construction would ignore the substantial losses incurred by Plaintiff prior to November 22, 1974, the Court is convinced that the proper construction of the Decision and Order in FEA-248 allowed Plaintiff to use the 1.5 cent per gallon relief to justify its MLSPs for its NGLPs for all of 1974.

10. Even assuming that Defendants' current position correctly construed the Decision and Order in FEA-248 as only providing prospective relief, Defendants would still be estopped from deying that such relief could be applied retroactively to justify Plaintiff's MLSPs for all of 1974. As a general rule, an adminstrative agency is not precluded from changing a prior position taken by it in the same proceeding, or in a separate proceeding. *Chisolm v. Defense Logistics Agency*, 656 F2d 42 (3rd Cir. 1981); *Jones v. Califano*, 576 F2d 12 (2nd Cir. 1978); *Interstate Contract Carrier Corp. v. United States*, 389 F.Supp. 1159

(D. Utah-1974). Where, under some circumstances a change in position by an agency would be arbitrary and capricious, the agency is bound to its prior position. *Id.* Principles of estoppel may be applied against a governmental agency during the course of litigation, provided that the challenging party shows that there was affirmative misconduct on the part of the agency, in addition to the general elements of estoppel. *F.C.I.C. v. Merrill*, 332 U.S. 380 (1947); *Moser v. United States*, 341 U.S. 41 (1951); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Portmann v. United States*, 674 F2d 1155 (7th Cir. 1982); *Broad Avenue Laundry and Tailoring v. United States*, 681 F2d 746 (Ct.Cl. 1982); *United States v. Ruby Co.*, 588 F2d 697 (9th Cir. 1978), cert. den. 442 U.S. 917 (1979); *Davis, Administrative Law Treatise*, (2d Ed. 1983) Sections 20:1 to 20:6. While Courts under some circumstances have refused to apply the estoppel doctrine against administrative agencies, the Court believes that such doctrine should be applied to the facts presented in this matter. Here Plaintiff turned to the highest ranking officials in FEA for guidance concerning the proper application and effect of the Decision and Order in FEA-248. Such officials, as the draftsmen of such Decision and Order, would logically have known its proper intent, and while acting within the scope of their authority they represented to the Plaintiff that such relief could be applied retroactively. Such representations induced the Plaintiff to apply the 1.5 cent per gallon relief to justify all of its 1974 MLSPs for its NGLPs. Neither the representation made by such officials nor the resultant conduct induced thereby violated any regulation, order or statute of which the Plaintiff had constructive notice. Neither the public treasury nor public lands, nor any other equally substantial governmental interest would be affected by the estoppel, since the Defendants seek restitution on behalf of those wholesalers who purchased NGLPs from the Plaintiff

rather than restitution to or from any governmental agency. The Plaintiff has shown the existence of the general elements of estoppel, because the representations made by FEA's officials induced the Plaintiff to take action as a result of which Plaintiff would now suffer injury if it were required to make restitution to its wholesale purchasers. *United States v. Ruby, supra.* Defendants' conduct in seeking to penalize Plaintiff for action taken in reliance upon their prior representations, and in seeking to apply retroactively their new construction of the Decision and Order in FEA-248, is arbitrary and capricious, and such conduct justifies application of the estoppel doctrine in this instance. *Boston Edison Co. v. F.P.C.,* 557 F2d 845 (D.C. Cir. 1977), cert. den. sub. nom. *Town of Norwood, Mass. v. Boston Edison Co.,* 434 U.S. 956 (1977); *Corniel-Rodriguez v. I.N.S.,* 532 F2d 301 (2d Cir. 1976); *Molton, Allen and Williams, Inc. v. Harris,* 613 F2d 1176, 1179 (D.C. Cir. 1980); *Lagna-Hermosa Corp. v. Martin,* 643 F2d 1376 (9th Cir. 1981); *NLRB v. Magestic Weaving Co.,* 355 F2d 854, 859-861 (2d Cir. 1966); *Retail, Wholesale and Dept. Store Union v. NLRB,* 466 F2d 380 (D.C. Cir. 1972); *Otter Tail Power Co. v. FERC,* 583 F2d 399, 408 (8th Cir. 1978), cert. den. 440 U.S. 950 (1979); *Squaw Transit Co. v. United States,* 574 F2d 492 (10th Cir. 1978).

11. Defendants argue the exception relief granted Plaintiff in FEA-248 was only applicable to computations of MLSPs under Subpart E and was automatically terminated upon issuance of new Subpart K, and that therefore the Plaintiff could not use such relief after January 1, 1975 in conjunction with the provisions of Subpart K. This construction of the Decision and Order in FEA-248 is erroneous and is inconsistent with the clear and unambiguous language of the FEA's Order; also, it is contrary to the contemporaneous construction given to such Order by FEA's highest ranking officials. Though the Decision

and Order states that the 1.5 cent per gallon relief was to be used in conjunction with pricing under Section 212.82 (Subpart E), it then goes on to state, at page 6 paragraph 5 (Administrative Record at p. 283) as follows:

> (5) In the event the F.E.A promulgates new, generally applicable regulations which govern the determination of the maximum permissible selling prices of propane, butane and natural gasoline, the *F.E.A. may by written order rescind this interim exception approval in whole or in part;* provided that, prior to taking any such action, the F.E.A. shall inform McCulloch Gas Processing Corporation of the proposed action and afford MGPC of an opportunity to comment upon the proposed action." (Emphasis supplied).

The Decision and Order itself contemplated continuation of the exception relief *after* adoption of new Subpart K, for it stated that such exception relief could be terminated only after the following events transpired: (a) promulgation of new Subpart K; (b) *subsequent* notice by FEA to Plaintiff of its intent to terminate the relief, and an opportunity being afforded to Plaintiff to comment upon such proposed action; (c) *subsequent* issuance of a written order rescinding such relief. Agency orders have the force and effect of law, and are binding upon the agency unless effectively rescinded in compliance with applicable administrative procedures. *United States v. Nixon,* 418 U.S. 683, 694-696 (1974); *United States v. Shaughnessy,* 347 U.S. 260 (1954); *Service v. Dulles,* 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Chapman v. Sheridan-Wyoming Coal Co. Inc.,* 338 U.S. 621, 629 (1950). Thus Defendants, since they expressly provided that the exception relief granted in FEA-248 would continue in effect after adoption of new Subpart K, and until effectively rescinded, should not

now be permitted to alter, unilaterally and in violation of applicable procedural requirements, such Decision and Order so as to preclude the exception relief in conjunction with Subpart K.

12. Even assuming Defendants' construction of the Decision and Order in FEA-248 was proper, Defendants would be estopped from denying that such relief could be applied prospectively in conjuction with the relief provided by new Subpart K. The principles of estoppel, herein noted, are applicable to this question, since FEA's highest ranking officials represented to the Plaintiff that such relief could be applied prospectively into 1975 in conjunction with the provisions of Subpart K. Defendants cannot now penalize the Plaintiff for conduct induced by such representations.

13. Defendants contend that the exception relief granted in FEA-248 could not be applied in conjunction with the additional relief provided by the Class Exception for the year 1974. Basically this construction of the Decision and Order in FEA-248 hinges upon Defendants' basic contention that such relief applied only to Plaintiff's pricing under Subpart E. Defendants urge that since the Class exception gave the provision of Subpart K retroactive effect, Plaintiff was required to choose between the relief granted by the Class Exception and the relief granted by FEA-248. As was noted above, this construction is erroneous. Defendants pointed to no language in Subpart K, nor in the Decision and Order in FEA-248, nor in the Class Exception, which indicates that such provisions are intended to be exclusive of any other relief granted by FEA. Furthermore, Defendants' current position ignores the contemporaneous construction given the Class Exception by FEA's officials when they represented to the Plaintiff that it could use the 1.5 cent per gallon relief in conjunction with its pricing under the Class

Exception. That contemporaneous construction of the Class Exception also deserves weight in that it was made by the draftsmen of the Class Exception as well as the Decision and Order in FEA-248. Therefore the Defendants' current construction of the Decision and Order in FEA-248 is erroneous, and inconsistent with the agency's previous position. The Court concludes that exception relief granted Plaintiff in FEA-248 could be applied in conjunction with the additional relief provided by the Class Exception.

14. Assuming the Defendants' construction of the Decision and Order in FEA-248 and of the Class Exception were reasonable, Defendants would still be estopped from denying that the 1.5 cent per gallon relief could be applied in conjunction with the additional relief afforded by the Class Exception. The principles of estoppel, set forth above, are equally applicable to this question since Defendants' highest ranking officials represented to the Plaintiff that the 1.5 cent per gallon relief could be applied in conjunction with the provisions of the Class Exception. Defendants should not now penalize the Plaintiff for conduct induced by such representations.

15. By the express language of FEA in its order, effective termination of the exception relief granted Plaintiff in FEA-248 required Defendants to (a) promulgate new Subpart K, (b) notify Plaintiff of its intent to terminate such relief, (c) afford Plaintiff of an opportunity to comment upon such intent, and (d) to issue a subsequent written order rescinding such relief. The Decision and Order in FEA-248, at p. 6 paragraph 5, supra, defines the procedure by which the agency could effectively terminate such exception relief. Such provision was set forth in a final, binding, formal ruling of the agency, and therefore binds the agency until effectively rescinded or terminated. *United States v. Nixon, supra; United States*

v. Shaughnessy, supra; Internal Revenue Service v. Dulles, supra; Vitarelli v. Seaton, supra; Chapman v. Sheridan-Wyoming Coal Co., supra. Agency action taken in violation of its own binding rules and orders is null and void, and is of no effect. *Id.* Defendants now contend that the 1.5 cent per gallon relief was automatically terminated upon the issuance of new Subpart K on January 1, 1975. This construction of the Decision and Order is erroneous, and inconsistent with the contemporaneous construction given the Decision and Order by FEA's highest ranking officials, and therefore the Court will not defer to it.

16. Even assuming Defendants' current construction of paragraph 5 of the Decision and Order in FEA-248 was reasonable, Defendants would still be estopped from denying that such exception relief could not be terminated except by the procedures set forth above. The principles of estoppel, set forth above, are equally applicable to this question since FEA's officials represented to the Plaintiff that the exception relief could not be terminated unless this procedure was followed. Defendants' failure to follow this procedure induced the Plaintiff to continue to apply the 1.5 cent per gallon relief since it was under the impression that such relief was never effectively terminated by the Defendants. Defendants cannot now penalize Plaintiff for conduct induced by such representations.

17. The exception relief granted Plaintiff in FEA-248 was never effectively terminated by DOE or its predecessor agencies. Therefore, it continued in effect until January 28, 1981 when DOE's price control authority was terminated by Executive Order No. 12,287. FEA issued a Supplemental Order in FEA-248 on March 6, 1975 which purported to terminate the exception relief retroactively effective January 1, 1975. Such Supplemental Order construes the Decision and Order in FEA-248 in a manner inconsistent with the written terms of the Order, and the

contemporaneous construction of the Decision and Order previously given by FEA's officials. While correspondence between Plaintiff and FEA may have indicated that there was much confusion within the FEA concerning the proper application and effect of the Decision and Order in FEA-248, neither FEA nor DOE ever notified Plaintiff that they intended to terminate the exception relief prior to March 3, 1975. The March 6, 1975 Supplemental Order for the first time invited the Plaintiff to comment upon FEA's proposed termination of the relief. Then, when Plaintiff did respond, FEA failed to follow up on that correspondence by issuing a written order terminating the relief granted in FEA-248. In fact, FEA and DOE never did respond to the Plaintiff's contentions in opposition to the termination of the relief. Defendants now contend that FEA informally reviewed the materials submitted by Plaintiff, and found that they "failed to show cause" why the relief should not be terminated, and then informally finalized the termination of the exception relief ten days after service of the Supplemental Order upon the Plaintiff. However, that procedure, if it did occur, was not in conformity with the requirement of the Decision and Order in FEA-248 that FEA terminate such exception relief by written order following notice and an opportunity to respond. By Defendants' own admission, the written order preceded the opportunity to comment, and Plaintiff never received a response to the materials submitted in response to the written order. Although Defendants were not required to issue formal findings of fact and conclusions of law under these circumstances, due process and applicable rules of procedure and fairness required them to issue some informal statement or notice explaining why the Plaintiff's materials were insufficient, and why it determined to proceed to terminate the exception relief, and decisions made in controvention of this requirement are arbitary and capricious. *Morgan v. United*

States, 298 U.S. 468, 480 (1936); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Portland Cement Assn. v. Ruckelshaus,* 486 F2d 375 (D.C. Cir. 1973) cert. den. 417 U.S. 921, appeal after remand 513 F2d 506, cert. den. 423 U.S. 1025; *Nutritional Foods Assn. v. Weinberger,* 512 F2d 688 (2d Cir. 1975), cert. den. 423 U.S. 827, on remand 418 F.Supp. 394, appeal after remand 557 F2d 325; *Westchester Gen. Hosp., Inc. v. Department of Health, Ed. and Welfare,* 464 F.Supp. 236 (M.D.Fla. 1979). Whether or not Defendant acted reasonably in failing to terminate such relief is not at issue. Defendants failed to comply with the terms of their own binding order, and therefore action taken by Defendants in contravention of such order is null and void, and did not effectively terminate such relief. *Kelly v. Railroad Retirement Board,* 625 F2d 486 (3rd Cir. 1980). Furthermore, its attempt to informally terminate such relief without responding to the materials submitted by the Plaintiff, and without issuing an informal statement explaining why it determined that termination of such relief was justified, was ineffective, arbitrary and capricious. Therefore, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment, to the extent it pertains to the reasonableness of the amount of exception relief granted in FEA-248, be, and the same hereby is, denied. It is further

ORDERED that the remainder of Plaintiff's Motion for Summary Judgment be, and the same hereby is, granted. It is further

ORDERED that Defendants' Motion to Strike, or in the Alternative for Leave to Take Discovery in Accordance with Rule 56(f) be, and the same hereby is, denied. Judgment shall be entered in accordance with these Findings of Fact and Conclusions of Law.

Dated this 28th day of February, 1984.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. C79-0279B

MGPC, INC., a Wyoming corporation,
Plaintiff,

vs.

CHARLES DUNCAN, Secretary of the
Department of Energy, et al.,
Defendants.

JUDGMENT

This action came on for hearing before the Court, the Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming presiding, and the issues having been duly heard, and a decision having been duly rendered; it is ORDERED, ADJUDGED and DECREED that plaintiff's Complaint, to the extent it requests the Court to declare that the 1.5 cent per gallon exception relief granted plaintiff in FEA-248 was unreasonably low in amount or was arbitrary and capricious, and not supported by substantial evidence in the record as a whole, under the circumstances present at that time it was granted, be, and the same hereby is, dismissed with prejudice. It is further ORDERED, ADJUDGED and DECREED that the November 22, 1974 Decision and Order in FEA-248 permitted plaintiff to apply the 1.5 cent per gallon exception relief granted therein retroactively to justify its Maximum Lawful Selling Prices for all of calendar year 1974, and prospectively into 1975 and thereafter, until effectively terminated in compliance with the terms and conditions of such Decision and Order; that the November 22, 1974 Decision and Order in FEA-248

permitted Plaintiff to apply the 1.5 cent per gallon exception relief in conjunction with the additional relief provided by Subpart K and the Class Exception; that the 1.5 cent per gallon exception relief granted plaintiff in FEA-248 was never effectively terminated by the Department of Energy, or any of its predecessor agencies, in compliance with the terms and conditions of the November 22, 1974 Decision and Order issued in such proceeding, and therefore continued in effect until January 30, 1981 when the Department of Energy's price control powers were terminated. It is further

ORDERED, ADJUDGED and DECREED that the Department of Energy, its officers and employees, are hereby permanently enjoined from issuing any decision or order, or form otherwise proceeding in any manner not consistent with the Court's construction of the November 22, 1974 Decision and Order in FEA-248 as set forth herein. It is further

ORDERED, ADJUDGED and DECREED that plaintiff recover its costs herein.

Dated this 29th day of February, 1984.

UNITED STATES DISTRICT JUDGE

APPENDIX C

CONSTITUTIONAL PROVISION

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

STATUTES

ECONOMIC STABILIZATION ACT AMENDMENTS OF 1971

PUBLIC LAW 92-210; 85 STAT. 743

12 U.S.C. §1904 Note (1976)

"§ 203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

> "(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title; and
>
> "(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

"(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes

of this title and orderly economic growth. Such standards shall—

"(1) be generally fair and equitable;

"(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

"(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

"(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

"(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

"(c) (1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (a) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraph (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

"(d) Notwithstanding any other provisions of this title, this title shall be implemented in such a manner that wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his

earnings are no longer substandard or he is no longer a member of the working poor.

"(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders, providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement of reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly economic growth.

"(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

"(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or

"(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or

"(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

"(g) For the purposes of this section the term 'wages' and 'salaries' do not include contributions by any employer pursuant to a compensation adjustment for—

"(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of section 401(a), 404(a)(2), or 403(b) of the Internal Revenue Code of 1954;

"(2) any group insurance plan; or

"(3) any disability and health plan;

unless the President determines that the contributions made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b).

"(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

"(i) Rules, regulations, and orders issued under this title shall insofar as practicable be designed to encourage labor-management cooperation for the purpose of achieving increased productivity, and the Executive Director of the National Commission on Productivity shall when appropriate be consulted in the formulation of policies, rules, regulations, orders, and amendments under this title.

"§ 207. Administrative procedure

"(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of sections 552, 553, and 555(e) of title 5, United States Code.

"(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an

interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings where deemed advisable, for considering such requests for action under this section.

"(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a charge or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title.

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding

an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of

the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States

under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such

permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

PUBLIC LAW 93 - 159; 87 STAT. 627

An Act to authorize and require the President of the United States to allocate crude oil, residual fuel oil, and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that —

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized

most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

DEFINITIONS

Sec. 3. For purposes of this Act:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to —

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than

by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B), and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

MANDATORY ALLOCATION

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and

refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each

person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of

LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e)(1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct

inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If—

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A)

the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take

effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970, and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

EFFECT ON OTHER LAWS AND ACTIONS TAKEN THEREUNDER

Sec. 6. (a) All actions duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act.

(b) The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

(c)(1) Except as specifically provided in this subsection, no provisions of this Act shall be deemed to convey to any person subject to this Act immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) As used in this subsection, the term "antitrust laws" includes—

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.);

(B) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.);

(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the

Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9); and

(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a.).

(3) The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this Act.

(4) Whenever it is necessary, in order to comply with the provisions of this Act or the regulation or any orders under section 4 thereof, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 5(b) of this Act); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication shall take place only in the presence of a representative of the Antitrust Division of the Department of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal

Trade Commission, where it shall be made available for public inspection.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under section 4 of this Act.

(6) There shall be available as a defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this act or the regulation or any order under section 4 thereof, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection.

MONITORING BY FEDERAL TRADE COMMISSION

Sec. 7. (a) During the forty-five day period beginning on the effective date on which the regulation under section 4 first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness of this Act and actions taken pursuant thereto.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 6, 9, and 10 of the Federal Trade Commission Act to gather and compile information and to require furnishing of

information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 4 of the Federal Trade Commission Act).

FEDERAL ENERGY ADMINSTRATION ACT OF 1974

PUBLIC LAW 93-275; 88 STAT. 96

An Act to reorganize and consolidate certain functions of the Federal Government in a new Federal Energy Administration in order to promote more efficient management of such functions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This Act may be cited as the "Federal Energy Adminstration Act of 1974".

DECLARATION OF PURPOSE

Sec. 2. (a) The Congress hereby declares that the general welfare and the common defense and security require positive and effective action to conserve scarce energy supplies, to insure fair and efficient distribution of, and the maintenance of fair and reasonable consumer prices for, such supplies, to promote the expansion of readily usable energy sources, and to assist in developing polices and plans to meet energy needs of the Nation.

(b) The Congress finds that to help achieve these objectives, and to assure a coordinated and effective approach to overcoming energy shortages, it is necessary to reorganize certain agencies and functions of the executive branch and to establish a Federal Energy Adminstration.

(c) The sole purpose of this Act is to create an adminstration in the executive branch, called the Federal Energy Adminstration, to vest in the Administration certain functions as provided in this Act, and to transfer to such

Administration certain executive branch functions authorized by other laws, where such transfer is necessary on an interim basis to deal with the Nation's energy shortages.

ESTABLISHMENT

Sec. 3. There is hereby established an independent agency in the executive branch to be known as the Federal Energy Administration (hereinafter in this Act referred to as the "Administration").

OFFICERS

Sec. 4. (a) There shall be at the head of the Administration an Administrator (hereinafter in this Act referred to as the "Administrator"), who shall be appointed by the President, by and with the advice and consent of the Senate. The Administrator shall receive compensation at the rate prescribed for offices and positions at level II of the Executive Schedule (5 U.S,C. 5313). The Administration shall be administered under the supervision and direction of the Administrator.

(b) (1) The functions and powers of the Administration shall be vested in and exercised by the Administrator.

(2) The Administrator may, from time to time and to the extent permitted by law, consistent with the purposes of this Act, delegate such of his functions as he deems appropriate.

(c) There shall be in the Administration two Deputy Administrators, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate prescribed for

offices and positions at level III of the Executive Schedule (5 U.S.C. 5314).

(d) There are authorized to be in the Administration six Assistant Administrators, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate prescribed for offices and positions at level IV of the Executive Schedule (5 U.S.C. 5315).

(e) There shall be in the Administration a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate prescribed for offices and positions at level IV of the Executive Schedule (5 U.S.C. 5315).

(f)(1) There are authorized to be in the Administration not more than nine additional officers who shall be appointed by the Administrator and shall receive compensation at the rate prescribed for offices and positions at level V of the Executive Schedule (5 U.S.C. 5316).

(2) If any person, other than an officer within subsections (c), (d), or (e) of this section, is to be assigned principal responsibility for any program that shall be instituted in the Administration for either (i) allocation, (ii) pricing, (iii) rationing (if effected), or (iv) Federal and State coordination, he shall be one of the officers authorized by paragraph (1) of this subsection except that he shall be appointed by the President by and with the advice and consent of the Senate.

(3) Appointments to the positions described in this subsection may be made without regard to the provisions of title 5 of the United States Code governing appointments in the competitive service.

(g) Subject to subsection (f) of this section, officers appointed pursuant to this section shall perform such

functions as the Administrator shall specify from time to time.

(h) The Administrator shall designate the order in which the Deputy Administrators and other officials shall act for and perform the functions of the Administrator during his absence or disability or in the event of a vacancy in his office.

(i)(1) For the purposes of this Act, section 208(b) of title 18, United States Code, relating to conflicts of interest, can be invoked and implemented only by the Administrator personally. Such subsection shall not be invoked as to any person unless and until—

(A) the Congress has received, ten days prior thereto, a written report containing notice of the Administrator's intention so to invoke such subsection, a detailed statement of the subject matter concerning which a conflict exists; and in the case of an exemption set forth in clause (1) of such subsection, the nature of an officer's or employee's financial interest; or in the case of an exemption set forth in clause (2) of such subsection, the name and statement of financial interest of each person who will come within such exemption; and

(B) Such written report is published in the Federal Register.

(2) Nothing contained in this subsection shall affect in any way the applicability or operation of other laws relating to officers and employees of the United States Government.

(j) No individual holding any of the positions described in subsections (a), (c), (d), and (e) of this section may also hold any other position in the executive branch during the same period.

FUNCTIONS AND PURPOSES OF THE FEDERAL ENERGY ADMINISTRATION

Sec. 5. (a) Subject to the provisions and procedures set forth in this Act, the Administrator shall be responsible for such actions as are taken to assure that adequate provision is made to meet the energy needs of the Nation. To that end, he shall make such plans and direct and conduct such programs related to the production, conservation, use, control, distribution, rationing, and allocation of all forms of energy as are appropriate in connection with only those authorities or functions—

(1) specifically transferred to or vested in him by or pursuant to this Act;

(2) delegated to him by the President purusant to specific authority vested in the President by law; and

(3) Otherwise specifically vested in the Administrator by the Congress.

(b) To the extent authorized by subsection (a) of this section, the Administrator shall—

(1) advise the President and the Congress with respect to the establishment of a comprehensive national energy policy in relation to the energy matters for which the Administration has responsibility, and, in coordination with the Secretary of State, the integration of domestic and foreign policies relating to energy resource management;

(2) assess the adequacy of energy resources to meet demands in the immediate and longer range future for all sectors of the economy and for the general public;

(3) develop effective arrangements for the participation of State and local governments in the resolution of energy problems;

(4) develop plans and programs for dealing with energy production shortages;

(5) promote stability in energy prices to the consumer, promote free and open competition in all aspects of the energy field, prevent unreasonable profits within the various segments of the energy industry, and promote free enterprise;

(6) assure that energy programs are designed and implemented in a fair and efficient manner so as to minimize hardship and inequity while assuring that the priority needs of the Nation are met;

(7) develop and oversee the implementation of equitable voluntary and mandatory energy conservation programs and promote efficiencies in the use of energy resources;

(8) develop and recommend policies on the import and export of energy resources;

(9) collect, evaluate, assemble, and analyze energy information on reserves, production, demand, and related economic data;

(10) work with business, labor, consumer and other interests and obtain their cooperation;

(11) in administering any pricing authority, provide by rule, for equitable allocation of all component costs of producing propane gas. Such rules may require that (a) only those costs directly related to the production of propane may be allocated by any producer to such gas for purposes of establishing any price for propane, and (b) prices for propane shall be based on the prices for propane in effect on May 15, 1973. The Administrator shall not allow costs attributable to changes in ownership and movement of

propane gas where, in the opinion of the Administrator, such changes in ownership and movement occur primarily for the purpose of establishing a higher price; and

(12) perform such other functions as may be prescribed by law.

TRANSFERS

Sec. 6 (a) There are hereby transferred to and vested in the Administrator all functions of the Secretary of the Interior, the Department of the Interior, and officers and components of that Department—

(1) as relate to or are utilized by the Office of Petroleum Allocation;

(2) as relate to or are utilized by the Office Energy Conservation;

(3) as relate to or are utilized by the Office of Energy Data and Analysis; and

(4) as relate to or are utilized by the Office of Oil and Gas.

(b) There are hereby transferred to and vested in the Administrator all functions of the Chairman of the Cost of Living Council, the Executive Director of the Cost of Living Council, and the Cost of Living Council, and officers and components thereof, as relate to or are utilized by the Energy Division of the Cost of Living Council.

ADMINSTRATIVE PROVISIONS

Sec. 7. (a) (1) The Administrator may appoint, employ, and fix the compensation of such officers and employees, including attorneys, as are necessary to perform the functions vested in him, and prescribe their authority

and duties. In addition to the number of positions which may be placed in GS–16, 17, and 18 under existing law, not to exceed 91 positions may be placed in GS–16, 17, and 18 to carry out the functions under this Act: *Provided,* That the total number of positions within the Administration in GS–16, 17 and 18 shall not exceed 105: *And provided further,* That, except as provided in paragraph (2) of this subsection, the authority under this subsection shall be subject to the standards and procedures prescribed under Chapter 51 of title 5, United States Code, and shall continue only for the duration of the exercise of functions under this Act.

(2) Twenty-five of the GS–16, 17, and 18 positions authorized by paragraph (1) of this subsection may be filled without regard to the provisions of title 5 of the United States Code governing appointments in the competitive service.

(b) The Administrator may employ experts, expert witnesses, and consultants in accordance with section 3109 of title 5 of the United States Code, and compensate such persons at rates not in excess of the maximum daily rate prescribed for GS–18 under section 5332 of title 5 of the United States Code for persons in Government service employed intermittently.

(c) The Administrator may promulgate such rules, regulations, and procedures as may be necessary to carry out the functions vested in him: *Provided,* That:

(1) The Administrator shall, before promulgating proposed rules, regulations, or policies relating to the cost or price of energy, transmit notice of such proposed action to the Cost of Living Council and provide a period, which shall not be less than five days from the receipt of such notice, for the Cost of

Living Council to approve or disapprove such proposed action. If during the period provided, the Cost of Living Council—

(A) approves such proposed action, it may take effect;

(B) disapproves such proposed action, it shall not take effect; or

(C) fails to either approve or disapprove such proposed action, it may take effect in the same manner as if the Cost of Living Council had given its approval.

(2) The Administrator shall, before promulgating proposed rules, regulations, or policies affecting the quality of the environment, provide a period of not less than five days from receipt of notice of the proposed action during which the Administrator of the Environmental Protection Agency may provide written comments concerning the impact of such rules, regulations, or policies on the quality of the environment. Such comments shall be published along with public notice of the proposed action.

The review required by paragraphs (1) and (2) of this subsection may be waived for a period of fourteen days if there is an emergency situation which, in the judgment of the Administrator, requires immediate action.

(d) The Administrator may utilize, with their consent, the services, personnel, equipment, and facilities of Federal, State, regional, and local public agencies and instrumentalities, with or without reimbursement therefor, and may transfer funds made available pursuant to this Act, to Federal, State, regional, and local public agencies and instrumentalities, as reimbursement for utilization of such services, personnel, equipment, and facilities.

(e) The Administrator shall cause a seal of office to be made for the Administration of such design as he shall approve, and judicial notice shall be taken of such seal.

(f) The Administrator may accept unconditional gifts or donations of money or property, real, personal, or mixed, tangible or intangible.

(g) The Administrator may enter into and perform contracts, leases, cooperative agreements, or other similar transactions with any public agency or instrumentality or with any person, firm, association, corporation, or institution.

(h) the Administrator may perform such other activities as may be necessary for the effective fulfillment of his administrative duties and functions.

(i) (1) (A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551 (4) of title 5, United States Code, issued pursuant to this Act, including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.

(B) Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment; except that the requirements of this paragraph as to time of notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In addition, public notice of all rules, regulations,

or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive widest possible notice.

(C) In addition to the requirements of paragraph (B), if any rule, regulation, or order described in paragraph (A) is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be afforded. To the maximum extent practicable, such opportunity shall be afforded prior to the issuance of such rule, regulation, or order, but in all cases such opportunity shall be afforded no later than forty-five days after the issuance of any such rule, regulation, or order. A transcript shall be kept of any oral presentation.

(D) Any officer or agency authorized to issue the rules, regulations, or orders described in paragraph (A) shall provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens and shall, by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, exception to, or exemption from, such rules, regulations, and orders. If such person is aggrieved or adversely affected by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the officer or agency and may obtain judicial review in accordance with paragraph (2) of this subsection when such denial becomes final. The officer or agency shall, by rule, establish appropriate procedures, including a hearing where deemed advisable by the officer or

agency, for considering such requests for action under this paragraph.

(E) In addition to the requirements of section 552 of title 5, United States Code, any agency authorized to issue the rules, regulations, or orders described in paragraph (A) shall make available to the public all internal rules and guidelines which may form the basis, in whole or in part, for any such rule, regulation, or order with such modifications as are necessary to insure confidentiality protected under such section 552. Such agency shall, upon written request of a petitioner filed after any grant or denial of a request for exception or exemption from rules or orders, furnish the petitioner with a written opinion setting forth applicable facts and the legal basis in support of such grant or denial. Such opinions shall be made available to the petitioner and the public within thirty days of such request, with such modifications as are necessary to insure confidentiality of information protected under such section 552.

(2)(A) Judicial review of administrative rulemaking of general and national applicability done under this Act, except that done pursuant to the Emergency Petroleum Allocation Act of 1973, may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation, or order, and judicial review of administrative rulemaking of general, but less than national, applicability done under this Act, except that done pursuant to the Emergency Petroleum Allocation Act of 1973, may be obtained only by filing a petition for review in the United States Court of Appeals for the appropriate circuit within thirty days from the date of promulgation of any such rule, regulation, or order, the appropriate circuit being defined as the circuit which contains the area or the greater part of the

area within which the rule, regulation, or order is to have effect.

(B) Notwithstanding the amount in controversy, the district courts of the United States shall have exclusive original jurisdiction of all other cases or controversies arising under this Act, or under rules, regulations, or orders issued thereunder, except any actions taken to implement or enforce any rule, regulation, or order by any officer of State or local government agency under this Act: *Provided,* That nothing in this section affects the power of any court of competent jurisdiction to consider, hear, and determine in any proceeding before it any issue raised by way of defense (other than defense based on the unconstitutionality of this Act or the validity of action taken by any agency under this Act). If in any such proceeding an issue by way of defense is raised based on the unconstitutionality of this Act or the validity of agency action under this Act, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code. Cases or controversies arising under any rule, regulation, or order of any officer of a State or local government agency may be heard in either (1) any appropriate State court, or (2) without regard to the amount in controversy, the district courts of the United States.

(3) The Administrator may by rule prescribe procedures for State or local government agencies authorized by the Administrator to carry out functions under this Act. Such procedures shall apply to such agencies in lieu of paragraph (1) of this subsection, and shall require that prior to taking any action, such agencies shall take steps reasonably calculated to provide notice to persons who

may be affected by the action, and shall afford an opportunity for presentation of views (including oral presentation of views where practicable) at least ten days before taking the action.

(j) The Administration, in connection with the exercise of the authority under this Act, shall be considered an independent Federal regulatory agency for the purposes of sections 3502 and 3512 of title 44 of the United States Code.

APPENDIX E

Price Control Regulations

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Subpart A—General

Sec.

212.1 Scope.
212.2 Applicability.
212.3 Adjusted base period profit margin.
212.10 General rules.
212.11 Profit margin limitation.

Subpart B—Definitions

212.31 Definitions.

Subpart C—Exemptions

212.51 General.
212.52 Federal and State and local governments.
212.53 Exports and Imports.
212.54 Crude Petroleum.

Subpart D—Producers of Crude Petroleum

212.71 Applicability.
212.72 Definitions.
212.73 Ceiling price rule.
212.74 Special release rule.

Subpart E—Refiners

212.81 Applicability.
212.82 Price rule.
212.83 Allocation of refiner's increased product costs.
212.84 Refiner's incentive factor.
212.85 Productivity Table.
212.88 Allocated crude pricing.

Subpart F—Resellers and Retailers

212.91 Applicability.
212.92 Definitions.
212.93 Price rule.

Subpart G—Lessors

212.101 Applicability.
212.102 Definitions.
212.103 Price rule.

Subpart H—New Items

212.111 New item and lease rule.

Sec.

Subpart I—Prenotification and Reporting

212.121 Rule.
212.122 Manner of prenotification.
212.123 Measure of prenotification period.
212.124 FEO action.
212.125 Implementation of price increases.
212.126 Reports.
212.127 Manner of reporting.
212.128 Recordkeeping.
212.129 Price information and posting.
212.130 Effect of failure to file or maintain reports or other documents required by or under certain sections of this part.

Subpart J—Accounting and Financial Reporting Requirements

212.151 Comparability of financial data.

AUTHORITY: Emergency Petroleum Allocation Act of 1973, P.L. 93-159, E.O. 11748, 38 FR 33577; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub L. 93-28, 87 Stat. 27; E.O. 11748, 38 FR 33575; Cost of Living Council Order Number 47, 38 FR 24.

Subpart A—General

§ 212.1 Scope.

(a) This part sets forth the price rules for firms engaged in the production and sale of covered products including crude petroleum, certain refined petroleum products, liquid petroleum gas, and other natural gas liquids, and the leasing of real property used in the retailing of gasoline, effective 11:59 p.m., e.s.t. January 14, 1974.

(b) The price rules of the Econimic Stabilization Program, Title 6 of the Code of Federal Regulations remain effective until 11:59 p.m., e.s.t. January 14, 1973 with respect to sales of covered products and the leasing of real property used in the retailing of gasoline.

(c) Price renegotiation provisions in price or rent contracts which depend for their operation upon the modification or termination of the Economic Stabilization Program, were previously declared to be inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program. Such renegotiation provisions continue to be inoperative as unreasonably inconsistent with the goals of both the Economic Stabilization Program and the Federal Energy Office. This part shall not operate to permit:

(1) A retroactive increase in prices or rents for goods or services sold or leased while those prices or rents were subject to past or present provisions of 6 CFR, or

(2) A prospective increase in prices or rents under the terms of a contract subject to a decision and order issued at any time pursuant to Title 6, except to the extent consistent with such decision and order.

(d) Any report required to be filed with the Cost of Living Council under 6 CFR, or any rule, order or regulation of the Council in effect on January 14, 1973 for any reporting period which ended on or before that date and which was not filed by that date, shall be filed with the Cost of Living Council in the form and within the time in which it would have been filed pursuant to Title 6. Forms required to be completed and placed among the records of a firm on a quarterly basis pursuant to Title 6 for any quarter which ended prior to January 14, 1974, shall be completed and filed amoung the firm's records in the form and within the time in which it would have been required to be so filed pursuant to Title 6.

§ 212.2 Applicability.

This part applies to each sale, lease or purchase of a covered product in the United States, and leases of real property used in the retailing of gasoline.

§ 212.3 Adjusted base period profit margins.

Any firm which has been authorized to adjust its base period profit margin pursuant to an exception granted under the authority of the Economic Stabilization Program prior to January 15, 1974 may continue to calculate its base period profit margin pursuant to that exception notwithstanding any other provision of this part.

§ 212.10 General rules.

(a) No firm (including an individual) may charge a price with respect to any sale or lease of an item after January 15, 1973 which exceeds the price permitted under this part for that item.

(b) No firm (including an individual) may knowingly pay a price with respect to any sale or lease of an item which exceeds the price permitted under this part, for that item. However this paragraph does not apply to the sale or lease of an item to any firm (including any individual) under circumstances of economic or other coercion in which the buyer or lessee, because of his need for that property or service, had no reasonable alternative but to pay the illegal price, and he reports the sale or lease to the Federal Energy Office for investigation promptly.

§ 212.11 Profit margin limitation.

(a) *Scope.* A firm shall compute a single profit margin for all of its manufacturing, service, retailing and wholesaling activities except where particular regulations under Title 6 of the Code of Federal Regulations require separate computation of a profit margin. For the purposes of this section, a firm is either (1) a parent and its consolidated entities or (2) an unconsolidated entity.

(b) *Applicability.* This section applies to all activities of a firm, including manufacturing, service, retailing and wholesaling, except those activities subject to particular regulations under Title 6 which require computation of separate profit margin.

(c) *General rule.* Except as otherwise provided by this part, a firm which charges a price for any item in excess of the base price for that item may not, for the fiscal year in which the price increase is charged, exceed its base period profit margin.

Subpart B—Definitions

§ 212.31 Definitions.

For purposes of this part—

"Aviation turbine fuels" means aviation fuels, Jet A, Jet A-1, and Jet B as defined in American Society for Testing and Materials (ASTM) D1655-71.

"Base period" means any two, at the option of the firm concerned, of the firm's fiscal years ending after August 15, 1968 except a fiscal year for which compliance is being measured. However, a firm which was authorized under the provisions of 6 CFR 130.110 in effect on August 12, 1973, to include in its base period a fiscal year which ended before August 15, 1968, may continue to include that fiscal year in its base period.

"Base period profit margin" means the ratio that the base period operating income (net sales less cost of goods sold and less normal and generally recurring costs of business operations including interest expense on long and short term debt determined before nonoperating items, extraordinary items, and income taxes) bears to the base period net sales as those net sales were reported on the firm's financial statement, or its financial

statement as restated pursuant to Subpart J prepared in accordance with generally accepted accounting principles consistently applied. For purposes of computing a base period profit margin, revenues and costs of items and sales exempt pursuant to 6 CFR 150.52, 150.53(b), 150.54(d) (3) and (4), 150.56, revenues and costs attributable to insurance transactions subject to Subpart M of Part 150 of Title 6 of the Code of Federal Regulations and revenues not included in annual sales or revenues as defined in this section shall be excluded. If a firm uses for its base period, a fiscal year ending after August 15, 1971 and prior to January 11, 1973, for which the firm exceeded a profit margin limitation imposed pursuant to the provisions of Part 300 of Title 6, in effect on January 10, 1973, it shall reduce its operating income for that fiscal year to the level of operating income it would have obtained for that fiscal year had it been in compliance with that Part 300 profit margin restraints.

"Base price" means the base price determined pursuant to § 212.82 or in the case of a new product § 212.111.

"Ceiling price" means the ceiling price determined pursuant to § 212.73 with respect to domestic crude petroleum.

"Class of purchaser" means purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

"Covered product" means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911.

"Domestic crude petroleum" means a crude petroleum produced in the United States or from the "outer continental shelf" as defined in 43 U.S.C. 1331.

"Customary price differential" includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

"Firm" means any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal government including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments. The FEO may, in regulations and forms issued in this part, treat as a firm: (1) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) any part of a firm.

"Fiscal quarter" means the fiscal quarter of the firm to which a regulation containing the term applies.

"Fiscal year" means the fiscal year of the firm to which a regulation containing the term applies. It is a consecutive 12-month period constituting an accounting year.

"Gasoline" means any of the various grades of retail gasoline other than aviation gasoline.

"Item" means a product or service unit sold, leased or offered for sale or lease to a class of purchaser.

"Kerosene" means the lighting or burning grade of kerosene.

"Manufacturing" means the trade or business of making, fabricating, or assembling a product or commodity by manual labor or machinery for sale and also includes the mining of natural deposits, the production or refining of oil from wells, and the refining of ores.

"Nonprofit organization" or one which is "not operated for profit" is a firm which is defined as a nonprofit organization in section 501(c) and is exempt under section 501(a) of the Internal Revenue Code of 1954, as amended.

"No. 1 heating oil" means heating oil grade No. 1 as defined in American Society for Testing and Materials (ASTM) D396-71.

"No. 1-D diesel fuel" means diesel fuel grade No. 1 as defined in American Society for Testing and Materials (ASTM) D975-71.

"No. 2 heating oil" means heating oil grade No. 2 as defined in American Society for Testing and Materials (ASTM) D396-71.

"No. 2-D diesel fuel" means diesel fuel grade No. 2 defined in American Society for Testing and Materials (ASTM) D975-71.

"No. 4 fuel oil" means fuel oil grade No. 4 as defined in American Society for Testing and Materials (ASTM) D396-71.

"No. 4-D diesel fuel" means diesel fuel grade No. 4 as defined in American Society for Testing and Materials (ASTM) D975-71.

"Parent" means a firm which is not directly or indirectly controlled by another firm.

"Parent and its consolidated entities," means a parent and those firms, if any, directly or indirectly controlled by the parent which are consolidated with the parent for purposes of financial statements prepared in accordance with generally accepted accounting principles. An individual shall be deemed to control a firm which is directly or indirectly controlled by him or by his father, mother, spouse, children or grandchildren.

"Petrochemical feedstock" means petrochemical feedstock as defined in § 211.183 of this chapter.

"Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field.

"Prenotification" means notice submitted to the Federal Energy Office pursuant to the provisions of Subpart I of this part.

"Price" means any consideration for the sale or lease of any property or services and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.

"Price adjustment" means the weighted average of all price increases and price decreases within a product line or service line.

"Price increase" means an increase in the unit price of an item or a decrease in the quality or quantity of substantially the same item.

"Producer" means a firm or that part of a firm which produces crude petroleum or any firm which owns crude petroleum when it is produced.

"Product" means a unit of personal property offered for sale to another person.

"Product line" means (a) a product or (b) an aggregation of products categorized by a four-digit Standard Industrial Classification (SIC) code if that is the customary pricing unit (e.g., cost or profit center) with respect to that aggregation of products. An aggregation of products which includes more than one four-digit SIC code or an aggregation of products of less than one four-digit SIC code may be used provided the level of aggregation reflects the entity's customary pricing unit (e.g., cost or profit center) with respect to that level of aggregation chosen.

"Profit margin" means the ratio that operating income (net sales less cost of goods sold and less normal and generally recurring costs of business operations, interest expense on long and short term debt determined before non-operating items, extraordinary items, and income taxes) bears to net sales as reported on the firm's financial statement or its financial statement as restated pursuant to Subpart J prepared in accordance with generally accepted accounting principles consistently applied. For purposes of computing a profit margin revenues and costs of items and sales exempt pursuant to 6 CFR 150.52, 150.53(b), 150.54(d)(3) and (4) and 150.56 and revenues and costs attributable to insurance transactions subject to the provisions of Subpart M of 6 CFR Part 150 shall be excluded.

"Refiner" means a firm (other than a reseller or retailer) or that part of such a firm which refines covered products or blends and substantially changes covered products, or refines liquid hydrocarbons from oil and gas field gases, or recovers liquefied petroleum gases incident to petroleum refining and sells those products to resellers, retailers, reseller-retailers or ultimate consumers. "Refiner" includes any owner of covered products which contracts to have those covered products

refined and then sells the refined covered products to resellers, retailers, resellers-retailers or ultimate consumers.

"Rent" means any price for the use of personal property of any description, including any charge no matter how identified in a lease or other agreement, for the use of any property or for any service in connection with the use of leased property.

"Reseller" means a firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers.

"Reseller-retailer" means a firm (other than a refiner) or that part of such a firm which carries on the functions of both a reseller and retailer.

"Retail sales" means sales of covered products to ultimate consumers.

"Retailer" means a firm (other than a refiner or reseller) or that part of such a firm which carries on the trade or business of purchasing covered products and reselling them to ultimate consumers without substantially changing their form.

"Service" includes any work or activities performed by a firm for a person, other than in an employment relationship, and also includes professional work or activities of any kind and work or activities performed by membership organizations for which dues are charged, and the leasing or licensing of property to another person.

"Service activities" means the trade or business of selling or making available services, including professional service organizations, non-profit

organizations, governments, and government agencies or instrumentalities which carry on those activities.

"Service line" means (a) a service, or (b) an aggregation of services categorized by a four-digit Standard Industrial Classification (SIC) code if that is the customary pricing unit (e.g., cost or profit center) with respect to that aggregation of services. An aggregation of services which includes more than one four-digit SIC code or an aggregation of services less than one four-digit SIC code may be used provided the level of aggregation reflects the entity's customary pricing unit (e.g., cost or profit center) with respect to that level of aggregation chosen.

"Special products" means gasoline, No. 2 heating oil and No. 2-D diesel fuel.

"State and local governments" means the several States, the District of Columbia, and the territories and possessions of the United States other than the Panama Canal Zone, a municipality or other political subdivision, authority, commission, board, district, public corporation or other agency or instrumentality of the several States, the District of Columbia, and the territories and possessions of the United States other than the Panama Canal Zone and any board, commission, agency or other instrumentality of a local government.

"Transaction" means an arms-length sale or lease between unrelated persons which are not members of a controlled group (as defined in 26 U.S.C. 1563(a)) and is considered to occur at the time and place when a binding contract is entered into between the parties.

"Unconsolidated entity" means a firm directly or indirectly controlled by a parent but not consolidated with the parent for purposes of financial statements prepared in accordance with generally accepted

accounting principles. An unconsolidated entity includes any firm consolidated with the unconsolidated entity for purposes of financial statements prepared in accordance with generally accepted accounting principles. An individual shall be deemed to control a firm which is directly or indirectly controlled by him or by his father, mother, spouse, childern or grandchildren.

"Unrelated person" means a person other than a person described in section 267(b) of the Internal Revenue Code of 1954, as amended.

Subpart C — Exemptions

§ 212.51 General.

Price adjustments with regard to the items and sales described in this subpart are exempt from the price rules prescribed in this part, However, revenues received from the sale of exempt items or from exempt sales are included in a firm's annual sales or revenues, as defined in § 212.31 for all purposes including determinations of price category classification and except as provided in Subpart B for purpose of computing profit margin.

§ 212.52 Federal, and State and local governments.

(a) *Federal.* Prices charged for any sale, lease or lease-sale of a covered product by any Federal department, agency or other instrumentality including any wholly owned Government corporations as defined in the Government Corporation Control Act of 1945, as amended are exempt.

(b) *State and local governments.* Prices charged for any sale, lease or lease-sale of a covered product by State and local governments are exempt.

§ 212.53 Exports and Imports.

(a) The Prices charged for export sales of covered products including sales to a domestic purchaser which certifies the product is for export are exempt.

(b) The prices charged for imports, but only the first sale into U.S. Commerce are exempt.

§ 212.54 Crude Petroleum.

The price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease as defined in Part 210 of this chapter is exempt.

Subpart — Refiners

§ 212.81 Applicability.

Except as provided in Subpart F, this subpart applies to each sale of a covered product which is purchased or refined by a refiner.

§ 212.82 Price rule.

(a) *Rule.* A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

(b) *Price increases.* (1) A price in excess of the base price of an item in a product line may be charged only to recover on a dollar-for-dollar basis those net increases in allowable costs that have been incurred with respect to the product line since the period for determining base cost and which the refiner continues to incur.

(2) For the purpose of determining whether net allowable costs have been incurred which permit the charging of a price in excess of the base price, base costs shall be compared with current costs. Current costs which exceed base costs may be used to justify a price in excess of the base price. "Allowable costs" under this section mean nonproduct costs attributable to refining operations under the customary accounting procedures generally accepted and historically and consistently applied by the firm concerned and exclude any costs attributable to marketing operations other than non-product costs attributable to the marketing of special products which may be included as allowable costs under this section to the extent that these costs allow an increase in the prices of special products above base prices by an amount not in excess of one cent per gallon which respect to retail sales and one half cent per gallon with respect to all other sales.

(c) *Application of price increases.* (1) A firm may not increase prices above base prices pursuant to this section until it complies with the prenotification requirements of Subpart I of this part.

(2) A firm which is authorized to charge a prenotified percentage price increase pursuant to Subpart of this part with respect to a product line by virtue of cost justification determined in accordance with this section, shall apply that percentage price increase in the following manner: (i) A refiner may charge a price in excess of the base price of a special product which reflects that part of the total allowable percentage price increase with respect to the product line allocable to sales of that special product provided that (a) the amount of the increase above the base price is calculated by use of the formula in paragraph (c) (3) (i) of this section; (b) the amount of increased costs allocable to that special product is equally

applied to each class of purchasers; and (c) the increase above the base prices may not be implemented more than once in any calendar month and must be implemented on the same date that increased product costs are added to May 15, 1973 selling prices to compute base prices pursuant to paragraph (f) of this section.

(ii) a refiner may charge a price in excess of the base price of its covered products other than special products which reflects that part of the total allowable percentage price increase with respect to the product line allocable to sales of those products or sales of special products not otherwise allocated pursuant to paragraph (e) (2) (i) of this section provided that (a) the amount of increase above the base price is calculated by use of the formula in paragraph (e) (3) (ii) of this section and (b) the amount of increased costs allocated to a covered product other than a special product is equally applied to each class of purchaser.

(3) *General formulae,* (i) For special products (i=1 and i=2):

$$d_i^e = \frac{S_i^e F}{V_i^e}$$

(ii) For covered products other than special products (i=3);

$$D_i^e = S_i^e F$$

Where; for (i) and (ii):

d_i^e=The dollar amount that may be added to each base price of the special product or products of the type "i" in the period "e" (the consecutive twelve-month period). The formula for special products must be computed separately for i=1 (No. 2 heating oil and No. 2-D diesel fuel) and i=2 (gasoline).

D_i^e=the total dollar amount a refiner may add in the period "e" (the consecutive twelve month period) to base prices of covered products of the type "i" in whatever amount it deems appropriate to each particular covered product other than a special product. The formula for covered products other than special products will only be computed for i=3 (all covered products other than special products and crude petroleum).

Vi^e=Estimated volume or quantity of sales of a specific covered product of the type "i" in the period "e" (the consecutive twelve-month period).

Si^e=Estimated total revenues from sales for the period "e" (the consecutive twelve-month period), of a specific covered product or products of the type "i" at May 15, 1973 price levels.

F=The percentage of cost-justification entered for all covered products under column (f), item 24, Part VI of CLC Form 22.

The time period for measurement is referenced by the superscript e:

^{e}=The consecutive twelve-month period for which the cost-justification is proposed, commencing the first day following the accounting month most recently ended prior to the date of signing the prenotification CLC Form 22.

The type of covered product is referenced by the subscript i:

i=1 represents No. 2 heating oil and No. 2-D diesel fuel.

i=2 represents gasoline.

i=3 represents all covered products other than special products and crude petroleum.

(d) *Price reductions.* A price charged in excess of the base price may continue to be charged only as long as the net increases in allowable costs which support that price in excess of the base price continue to be incured. Price reductions shall be made whenever and to the extent necessary to assure that, for any fiscal quarter, the weighted average of all price increases and price decreases in a product line does not exceed the percentage of cost justification for that line.

(e) *Productivity gains.* (1) Increases in allowable costs shall be reduced to reflect productivity gains. For the purpose of determining whether a price may be charged above a base price pursuant to this section, productivity gains shall be calculated on the basis of the average percentage gain in the applicable industrial category, as set forth in the table in § 212.85. To the extent provided in the table in § 212.85 productivity gains shall be taken into account in the calculation of all price increases during any fiscal year but only until the full productivity offset, derived from the table and calculated under paragraph (e)(2) of this section, has been used within that fiscal year.

(2) For the purpose of determining the extent to which a price increase is justified, each refiner shall calculate the sum of all of its labor costs (of the type required to be included as costs in reporting and prenotification forms issued pursuant to Subpart I of this part) as a percentage of sales for the product line concerned, and shall multiply that percentage by the average annual rate of productivity gain for the applicable industrial category, as set forth in the table in § 212.85. The result is the productivity gain, stated as a percentage, by which the total cost increase

must be reduced in order to be an allowable cost for the purposes of a price increase under this section.

(3) If the product line concerned extends to more than one industrial category, the average percentage gain in productivity in each category must be weighted in proportion to the ratio which its estimated sales in each industrial category for the most recently completed fiscal quarter bears to the total sales of that product line for that quarter.

(f) *Base price* — (1) *General rule.* (i) The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus *(a)* increased product costs incurred between the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83 and *(b)* the refiner incentive factor calculated and permitted pursuant to the provisions of § 212.84. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.

(ii) Notwithstanding the general rule in paragraph (f) (1) (i) of this section, in computing the base price for No. 1 heating oil, No. 4 fuel oil, Nos. 1-D and 4-D diesel fuel, kerosene and aviation turbine fuels, a refiner may, beginning with the month of January 1974, use adjusted May 15, 1973 selling prices. The adjusted May 15, 1973 price for No. 1 heating oil, No. 4 fuel oil, Nos. 1-D and 4-D diesel fuel, kerosene, and aviation turbine fuels, to each class of purchaser, is 2 cents plus the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973.

(iii) Notwithstanding the general rule in paragraph (f)(1)(i) of this section, with respect to an allocation sale made pursuant to § 211.186 of this chapter, the base price of petrochemical feedstock is 115 percent of the price calculated pursuant to paragraph (f)(1)(i) provided that in calculation, of the increased product costs for petrochemicals in § 212.83, the refiner uses the formula for special products, § 212.83(c)(2)(i).

(2) *Special products.* (i) Notwithstanding the general rule in paragraph (f)(1) of this section, in computing the base price for special products for each month beginning with January 1974, a refiner may use adjusted May 15, 1973 selling prices for No. 2 heating oil and No. 2-D diesel fuel, and must use adjusted May 15, 1973 selling prices for gasoline. In computing base prices for special products, a refiner may not increase its May 15, 1973 selling price to each class of purchaser more than once in any calendar month to reflect the increased product costs allowable pursuant to the provisions of § 212.83 the adjustment specified in paragraph (f)(2)(ii) of this section, or the incentive factor permitted pursuant to § 212.84 but may implement the increase on any day during that month.

(ii) The adjusted May 15, 1973 selling price for No. 2-D diesel fuel and No. 2 heating oil to each class of purchaser is 2 cents plus the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973. The adjusted May 15, 1973 selling price for gasoline to each class of purchaser is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 less the adjustment differential. The adjustment differential is computed by use of the following formula:

$$x = \frac{\$.02y}{z}$$

Where

x=The adjustment differential; that amount which must be deducted from the weighted average unit price at which each item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973.

y=The total number of units of Nos. 1 and 2 heating oil, No. 4 fuel oil, Nos. 1-D, 2-D and 4-D diesel fuel, kerosene and aviation turbine fuel domestically produced by the refiner in May 1973.

z=The total number of units of gasoline domestically produced by the refiner in May 1973.

(3) *Imputed prices.* If no transaction occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973 when a transaction occurred shall be used for purposes of computing the base price. If a refiner first offered an item for sale after May 15, 1973 and prior to the effective date of this paragraph, the first day when the item was offered for sale shall be used for purposes of computing the base price.

(g) *Base cost*—(1) *Base costs.* Base costs are the net allowable costs incurred with respect to the product line concerned and are calculated as follows:

(i) *Input costs.* The base cost with respect to costs of labor, crude petroleum and other input costs is the rate at which those costs were being incurred on May 15, 1973. If no input costs were incurred on that day, the base cost is the rate at which those costs were being incurred on the next day preceding May 15, 1973 on which input costs were incurred.

(ii) *All other costs.* The base cost with respect to all costs other than input costs is the rate at which those

costs were being incurred on May 15, 1973. However, if the base cost with respect to any costs other than an input cost cannot reasonably be determined by the method prescribed in the preceding sentence, that base cost is the average cost incurred throughout the last fiscal quarter which ended before May 15, 1973, in which costs were incurred with respect to the product line concerned as calculated in accordance with forms and instructions issued by the Federal Energy Office.

(2) *New items.* The base cost with respect to input costs for each new item, as defined in accordance with Subpart H, is calculated as of the date on which the new item concerned was first sold or leased in arms-length trading between unrelated persons. The base cost with respect to all other costs which cannot be calculated on the first day of sale is the average cost incurred throughout the fiscal quarter in which the new item concerned was first sold or leased in arms-length trading between unrelated persons.

(h) *Current cost*—(1) *Current costs.* Current costs are the net allowable costs incurred during the current cost period with respect to the item concerned excluding increased product costs incurred after May 15, 1973 and measured pursuant to § 212.83.

(2) *Input costs.* The current cost with respect to costs of labor, crude petroleum and other input costs is the rate at which those costs were being incurred on the last full day of business in the current cost period.

(3) *All other costs.* The current cost with respect to all costs other than input costs is the rate at which those costs were being incurred on the last full day of business in the current cost period. However, if the current cost with respect to all costs other than input costs cannot reasonably be determined by the method prescribed in the

preceding sentence, that current cost is the average cost incurred throughout the current cost period with respect to those costs as calculated in accordance with forms and instructions issued by the Federal Energy Office.

(4) *Current cost period.* The current cost period is the last accounting month preceding the date of signature of the prenotification document submitted in accordance with Subpart I of this part except that with respect to input and other costs which may be calculated as of a date certain, the rate at which these costs are incurred on the day which is the date of signature of the prenotification document may be considered the rate on the last full day of the current cost period.

(i) *Profit margin limitation.* A refiner which charges a price for any item in excess of the base price for that item in any fiscal year may not for the fiscal year in which the price increase is charged, exceed its base period profit margin as defined in § 212.31.

(j) *Certification.* Each refiner of gasoline must, with respect to each sale of gasoline other than a retail sale, certify in writing to the purchaser the octane number of the gasoline sold.

§ 212.83 Allocation of refiner's increased product costs.

(a) *Scope.* Except as provided in Subpart F this section prescribes the requirements governing the inclusion of a refiner's increased product costs in the computation of its base price pursuant to § 212.82(f) for covered products.

(b) *Definitions.* For purposes of this section—

"Cost of crude petroleum" means (1) For purposes of domestic crude petroleum, (a) in arms-length transactions, the purchase price provided that with respect to sales of crude petroleum subject to subpart L,

it conforms with the requirements of that subpart; (b) in a transaction between affiliated entities, the posted price for the new crude petroleum and petroleum produce from stripper wells the first sale of which is exempt pursuant to § 212.54 and the posted price or price determined pursuant to § 212.74(b) for base production control level crude petroleum. If there is no posted price in a particular field, the related price for that grade of new domestic crude petroleum and petroleum produced from stripper wells which is most similar in kind and quality at the nearest field for which the price is posted and the price determined pursuant to § 212.74(b) for base production control level crude petroleum. Cost of crude petroleum also includes the cost of unfinished oils and natural gas liquids which are used in refining and are further refined, and which are covered products. The cost of domestic crude petroleum, unfinished oils and natural gas liquids includes transportation costs. (2) For purposes of imported crude petroleum, the lended cost.

"Cost of petroleum product" means (1) For purposes of domestic petroleum products other than crude petroleum, the purchase price including transportation costs. (2) For purposes of imported petroleum products other than crude petroleum, the landed cost.

"Firm" means a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls.

"Increased product costs" means the sum of (1) the difference between the total cost of crude petroleum during the month of measurement and the total cost of crude petroleum during the month of May, 1973 plus (2) the difference between the total cost of petroleum product during the month of measurement and the total cost of petroleum product during the month of May, 1973. If a particular petroleum product was neither purchased nor

landed during the month of May 1973, the cost of that petroleum product in May 1973 shall be imputed to be the lowest price at or above which at least 10% of that product was priced by the refiner in transactions during the month of May 1973.

"Landed cost" means: (1) For purposes of complete arms-length transactions, the purchase price at the point of origin plus the actual transportation cost. (2) For purposes of products purchased in arms-length transactions and shipped pursuant to a transaction between affiliated entities, the purchase price at the point of origin plus the transportation cost computed by use of the accounting procedures generally accepted and consistently and historically applied by the firm concerned. (3) For purposes of products purchased in a transaction between affiliated entities and shipped pursuant to an arms-length transaction, the cost of the product computed by use of the customary accounting procedures generally accepted and consistency and historically applied by the firm concerned plus the actual transportation cost. (4) For purposes of products purchased and shipped pursuant to a transaction between affiliated entities, the costs of the product and the transportation both computed by use of the customary accounting procedures generally accepted and consistently and historically applied by the firm concerned.

"Transactions between affiliated entities" means all transactions between entities which are part of the same firm and transactions with entities in which the firm has a beneficial interest to the extent of entitlement of covered product by reason of the beneficial interest.

(c) *Allocation of increased-costs* — (1) *General rule* — (i) *Special products.* In computing base prices for sales of a special product, a refiner may increase its May 15,

1973 selling prices to each class of purchaser once each calendar month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of that special product using the differential between the month of measurement and the month of May, 1973 provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in paragraph (c)(2)(i) of this section. To the extent that a refiner does not allocate its increased product cost for a special product pursuant to this provision, it may include that part of its increased product costs attributable to sales of that special product in computing its base prices for covered products other than special products pursuant to paragraph (c)(1)(ii) of this section.

(ii) *Other than special products.* In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973 selling price to each class of purchaser each month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of covered products other than special products or sales of special products not otherwise allocated pursuant to paragraph (c)(1)(i) of this section using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in paragraph (c)(2)(ii) of this section and provide that the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to covered products other than special products, a refiner may apportion the total amount of increased product costs to a particular covered product

other than a special a special product in whatever amount he deems appropriate.

(2) *General formulae.* (i) For special products (i=1 and i=2):

$$d_i^u = \frac{A^t(V_i^n/V^n)+B_i^t+G_i^t-H_i^u}{V_i^u}$$

(ii) For covered products other than special products (i=3):

$$D_i^u = A^t(V_i^n/V^n)+B_i^t+G_i^t+H^u$$

Where; for (i) and (ii):

d_i^u=The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of the special product or products of the type "i" to each class of purchaser to compute the base price to each class of purchaser. The formula for special products must be computed separately for i=1 (No. 2 heating oil and No. 2-D diesel fuel) and for i=2 (gasoline).

D_i^u=The total dollar amount a refiner may apportion in the period "u" (the current month) to covered products of the type "i" in whatever amounts it deems appropriate to each particular covered product other than a special product. The formula for covered products other than special products will only be computed for i=3 (all covered products other than a special product and crude petroleum).

V^n=The total volume of all covered products sold in the period "n" (the consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month "u").

V_i^n=The total volume of a specific covered product or products of the type "i" sold in the period "n" (the

consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month "*u*").

V_i^u=The volume of quantity of a product or products of the type "*i*" estimated to be sold in the period "*u*" (the current month).

$$A^t = Q^t(C^t/Q^t - C^o/Q^o)$$

Which is the total increased cost of crude petroleum purchased or landed in the period "*t*" (the month of measurement).

Where:

Q^t=The total quantity or volume of crude petroleum purchased in the period "*t*" (the month of measurement). For imported crude petroleum, the quantity or volume landed in the period "*t*" (the month of measurement).

Q^o=The total quantity or volume of crude petroleum purchased in the period "*o*" (the month of May 1973). For imported crude petroleum, the quantity or volume landed in

C^o=The total cost of crude petroleum purchased or landed in the period "*o*" (the month of May 1973).

C^t=The total cost of crude petroleum purchased or landed in the period "*t*" (the month of measurement).

$$B_i^t = c_i^t - c_i^o - Y_i(q_i^t - q_i^o)$$

Which is the total increased cost of a specific covered product or products of the type "*i*" purchased or landed in the period "*t*" (the month of measurement).

Where:

c_i^o=The total cost of a covered product or products of the type "*i*" purchased in the period "*o*" (the month of May 1973). For imported products, the cost of products of the type "*i*" landed in the period "*o*" (the month of May 1973).

c_i^t=The total cost of a covered product or products of the type "*i*" purchased in the period "*t*" (the month of measurement). For imported products, the cost of products of the type "*i*" landed in the period "*t*" (the month of measurement).

q_i^o=The total quantity or volume of a covered product or products of the type "*i*" purchased in the period "*o*" (the month of May 1973). For imported products of the type "*i*", the total quantity or volume landed in the period "*o*" (the month of May 1973).

q_i^t=The total quantity or volume of a covered product or products of the type "*i*" purchased in the period "*t*" (the month of measurement). For imported products of the type "*i*", the total quantity or volume landed in the period "*t*" (the month of measurement).

Y_i=The lowest price at or above which at least 10% of the product or products of type "*i*" were priced in transactions during the month of May 1973 or, if none occurred in that month, in the month next preceding May 1973 in which such transactions occurred.

Alternatively, the cost of the product or products concerned during the month of May 1973 may be used if computed by use of accounting procedures generally accepted and consistently and historically applied by the firm concerned and provided that the FEO has approved in writing of the cost figures used.

$$G_i^t = J_i^t - K_i^t$$

Which is the total dollar amount of increased costs of the product or products of the type "*i*" not recovered in sales of that product through the period "*t*" (the month of measurement) that have been carried forward pursuant to paragraph (d) of this section or the total excess revenues derived from sales of the product or products of the type "*i*" which must be subtracted pursuant to paragraph (d) of this section.

Where:

J_i^t=The total dollar amount of increased product costs attributable to the product type "*i*" from August 1, 1973 through the period "*t*" (the month of measurement).

K_i^t=The total dollar amount of increased product costs attributable to the product type "*i*" and recovered by sales through the period "*t*" (the month of measurement) by adjusting the May 15, 1973 selling prices pursuant to the provisions of this subpart.

H_i^u=The portion of the total dollar amount available in the period "*u*" (the current month) for inclusion in price adjustments to special products of the type "*i*" which pursuant to paragraph (c)(1)(ii) of this section the refiner elects to include in prices of covered products other than special products for the period "*u*" (the current month).

H^u=The sum of the dollar amounts available in the period "*u*" (the current month) for inclusion in price adjustments to specific products which pursuant to paragraph (c)(1)(ii) of this section the refiner elects to include in calculating the base prices of covered products other than special products for the period "*u*" (the current month).

The type of covered product is referenced by the subscript *i*:

$_i$=1 represents No. 2 heating oil and No. 2-D diesel fuel.

$_i$=2 represents gasoline.

$_i$=3 represents all covered products other than special products and crude petroleum.

The time period for measurement is referenced in the superscript; where:

$_n$= The consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month.

$_o$= The month of May 1973.

$_t$= The month of measurement. (The month of measurement is the month preceding the current month.)

$_u$= The current month. Quantities calculated for the current month will be estimates which should be based on the best available data.

(d) *Carryover of costs.* (1) If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c)(1)(i) of this section and that unused amount of increased costs is not used to increase May 15, 1973 selling prices pursuant to paragraph (c)(1)(ii) of this section, the amount of increased product cost not recouped may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month. The total amount allowable under paragraph (c)(1)(i) of this section may not include any amount represented by the symbol "H" in the formula in paragraph (c)(2)(1) of this section which pursuant to paragraph (c)(1)(ii) of this

section the refiner has elected to include in a prior month in the calculation of the maximum permissible amount which may be used to adjust base prices of covered products other than special products. If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of more total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c) (1) (i) of this section, the amount of excess product costs recouped must be subtracted from the May 15, 1973 selling prices to compute the base prices for that special product for the subsequent month.

(2) If, in any month beginning with October 1973, a firm charges prices for covered products other than special products which result in the recoupment of more or less total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c) (1) (ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973 selling prices and the amount of increased product costs not recouped may be added to May, 15, 1973 selling prices to compute base prices for covered products other than special products in the subsequent month provided that the amount of the increased product cost not recouped and included in computing the base prices of a particular covered product other than a special product is equally applied to each class of purchaser. The total amount of increased product costs not recouped includes any amount represented by the symbol "H" in the formula in paragraph (c) (2) (ii) of this section which was available for inclusion in price adjustments to special products in a previous month and which the refiner elected pursuant to paragraph (c) (1) (ii) of this section to include in the calculation of the maximum permissible amount which may be used to

calculate base prices for covered products other than special products.

(e) *Affiliated entities.* For purposes of this section, transactions between affiliated entities may be used to calculate increased product costs. Whenever a firm uses a landed cost which is computed by use of its customary accounting procedures, the FEO may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect the actual costs of these entities or the FEO may disallow any costs which it determines to be in excess of the proper measurement of costs.

PART 212 — MANDATORY PETROLEUM PRICE REGULATIONS

Changes in the Price Regulations for Natural Gas Liquids and Natural Gas Liquid Products.

On September 6, 1974, the Federal Energy Administration issued a Notice proposing a number of significant changes in the Mandatory Petroleum Price Regulations (39 FR 32718, September 10, 1974). Comments were invited from interested persons by September 27, 1974, and more than 80 comments were received. A public hearing on the proposal was held September 30 and October 1, 1974, at which approximately 20 interested persons presented statements. The FEA has previously amended its regulations with respect to certain of the possible changes contained in the September 10 Notice. Amendments to the FEA regulations were issued on November 1, 1974 (39 FR 39259, November 6, 1974), and on November 29, 1974 (39 FR 42368, December 5, 1974), with action on the remaining proposals included in the September 10 Notice having been deferred, pending further study and analysis by the FEA.

The FEA has now completed its analysis of the comments and statements submitted in this proceeding on the proposal to promulgate new regulations designed specifically to cover the prices of natural gas liquids and products produced from natural gas liquids, including propane, and is today adopting new regulations on this subject, to be effective January 1, 1975.

Action on all other revisions to the price regulations proposed in the September 10 Notice is deferred until a later date. However, those possible revisions continue to be under active consideration by FEA for decision in this proceeding.

I. *Background.* In proposing to adopt new regulations designed specifically to cover natural gas liquids and natural gas liquid products, including propane, the FEA in its September 10 Notice outlined the basis for its statutory authority for such regulations and indicated that the refiners' price rules of the FEA are not well-suited for regulating prices of liquid products produced from natural gas because of the differences between the operations of a gas plant and a refinery.

The comments received in this proceeding have underscored those differences between gas processing and crude oil refining, and have made even more apparent the difficulty of formulating generally applicable regulations for a very complex sector of the petroleum industry. In the regulations adopted today, the FEA seeks to apply a set of rules to this sector of the industry which is as simple and understandable as possible. The FEA is fully aware, however, that these new regulations could have an unanticipated impact on various entities and interests. Accordingly, although the regulations issued today will provide the basic framework for FEA regulation of prices of natural gas liquids and natural gas liquid products, the FEA is aware that revisions to these regulations may well be called for.

A principal aspect of the regulations adopted today is that they serve to allocate costs of producing propane and other natural gas liquid products to the prices which may be charged for those products, consistent with the provisions concerning propane price regulations of § 5(b)(11) of the Federal Energy Administration Act of 1974 (Pub. L. 93-275). Although this approach has the advantages of permitting all natural gas royalty owners, producers and processors to be treated on an equivalent basis, and of avoiding the general non-cost justified price increases that were proposed in the September 10 Notice,

it necessarily involves price disparities because of the differing costs of crude oil and natural gas.

The alternative to a cost-based price regulatory system would be a system of administered prices at various levels of distribution. Under such a system, prices could be established for natural gas liquid products that would approximate the prices of crude petroleum derived products, on a BTU equivalency basis. To the extent that demand for natural gas liquid products is exaggerated by their relatively low prices in comparison with similar products produced from crude oil, such a price system could be expected to return demand to more normal levels. Such a system would also minimize the price disparity problem, which is particularly acute in the marketing sector of the propane industry. Single prices at given levels of distribution would, however, necessarily involve inequities for producers and processors having different costs, and those with the lowest costs, might be in a position to reap "windfall" profits. Further, in order for any administered ceiling price system at various levels of distribution to stimulate additional supplies, the price level that was established would have to be at or near the level needed to provide sufficient incentive for additional production, which would be a level not justified on the basis of costs for most existing production.

As the foregoing summary indicates, there is no single ideal solution to the regulation of natural gas liquid prices, and the regulations adopted by the FEA today are a necessary compromise among the conflicting considerations which must be taken into account. As stated in the September 10 Notice, the fundamental objective is to permit prices that will be as low as reasonably possible without adversely affecting the availability of the product. The adverse effects of price disparities stemming from the differing costs of crude oil

and natural gas on the distribution sector of the industry, and the added demand for natural gas liquid products priced at less than the prices for BTU equivalent crude petroleum derived products, were also among the problems adverted to by the FEA in its September 10 Notice. A further important consideration in this proceeding is that the FEA must ensure, to the maximum extent practicable, that its regulations do not have an undue adverse impact on any particular segment of the industry, and that established relationships and operations in the industry are not unnecessarily disrupted.

The principal features of the revised cost-based system with respect to the pricing of natural gas liquids being adopted today are: (1) The continuation of May 15, 1973 as the reference point from which increased costs and lawful prices are to be determined, but with an adjustment of May 15, 1973 selling prices of natural gas liquid products at the first sale level to at least 8.5 cents per gallon for propane, 9 cents per gallon for butane, and 10 cents per gallon for natural gasoline; (2) provision for the addition of up to 0.5 cents per gallon to May 15, 1973 selling prices to reflect increased non-product costs incurred in processing natural gas liquids; (3) provision for the addition of an increment to May 15, 1973 selling prices to account for actual increased cost of natural gas shrinkage attributable to the production of natural gas liquids since that date; (4) provision for the increased costs attributable to propane to be applied selectively among classes of purchaser by refiners, gas processors, and resellers in determining propane prices for sales to different classes of purchaser; (5) a requirement that refiners who process natural gas liquids exclude revenues which represent recovery of increased costs of crude oil from the revenues received in the sale of natural gas liquid products, for the purpose of determining net-back

payments to royalty owners or producers; and (6) a price rule for natural gas liquids extracted in gas processing facilities constructed after the effective date of these regulations which provides an incentive for the construction of such facilities by permitting somewhat higher prices to be charged for products produced in new plants. The FEA is also soliciting comments on an appropriate price incentive for the expansion of existing gas processing facilities. At the same time, the FEA is issuing an emergency amendment to its allocation regulations to govern the use of propane as a refinery fuel, to insure that undue volumes of propane are not consumed for this purpose.

II. *Definitions and applicability.* As indicated in the September 10 Notice, the application of price rules to natural gas liquids is complicated by the fact that a price for natural gas liquids is typically not determined until the natural gas liquid products are sold separately — with royalty owners, producers, and gas processors then receiving portions of the sales revenues as determined by contractual arrangement.

In order to clarify the applicability of FEA price regulations to these various transactions, two new definitions have been adopted. "First sale" is used to refer to the first transaction with respect to which a specified per unit (*e.g.,* cents-per-gallon) price is determined. "Net-back sale" is used to refer to transactions with respect to which a specified per unit price is not determined, but as to which the transferor of the product is entitled to receive a percentage of the ultimate sales revenues of the product or products involved. These new definitions are to make clear that FEA regulations apply to all transactions — both "first sales" and "net-back sales."

As to "net-back sales," entities such as royalty owners, producers, and gas processors may not receive greater "net-back" revenues per gallon than were received on May 15, 1973, unless the related "first sale" prices of the natural gas liquid products, upon which the amount of the net-back revenues are based, are increased above their May 15, 1973 levels pursuant to the regulations adopted today, or unless the contractual terms are revised to afford a larger percentage net-back. The FEA has determined that it would be administratively impracticable to seek to regulate, in effect, the various terms of the many contractual arrangements under which "net-backs" are determined. Accordingly, FEA regulations will not address the manner in which the net-back revenues are allocated between parties, except to provide specifically that the manner in which net-back revenues are allocated shall not constitute a basis upon which a first sale price may be increased.

The new Subpart K of Part 212 adopted today applies to all sales other than resales of natural gas liquids and natural gas liquid products by all entities, including producers, royalty owners, gas plant operators, and refiners. The definition of "refiner" set forth in § 212.31, which includes those entities which refine crude oil and which process natural gas to obtain natural gas liquids or natural gas liquid products, has not been changed. However, the applicability sections of Subpart E (Refiners) and Subpart K (Natural Gas Liquids) provide that where a refiner that refines crude oil and processes natural gas is involved, the provisions of Subpart K will be applied to the refiner's gas processing activities in order to calculate the increased product and nonproduct costs attributable to natural gas liquids and natural gas liquid products, which will then be used, together with increased costs determined under Subpart E for products refined derived from crude oil, to determine the lawful

selling prices for the refiner's total volumes of propane, butane, and natural gasoline, and for any covered products which are produced from propane, butane or natural gasoline.

III. *Adjusted May 15, 1973 prices.* May 15, 1973 is the date to which reference is made under FEA regulations in determining lawful prices for the sale of all covered products. This is done, in general, by use of those product costs incurred on May 15, 1973, or during the month of May, 1973, as the costs against which current product costs are measured, for purposes of determining the amount of increased product costs. The amount of increased product costs may then be applied to May 15, 1973 prices, to determine current lawful selling prices. This method of price determination serves, in general, to preserve a seller's May 15, 1973 margin (*i.e.,* the difference between May 15, 1973 product costs and May 15, 1973 selling prices) and to provide for a dollar-for-dollar pass through of increased product costs.

Originally, this May 15, 1973 date was chosen by the Cost of Living Council ("Council") for use in that part of its Phase IV petroleum regulations which was applicable to refiners. The Phase IV regulations were implemented by the Council in August, 1973. Upon review of the period which preceded the initiation of the Phase IV controls, the Council determined that the month of May, 1973 represented the most recent relatively stable time period during which market forces appeared to have been operating relatively free of the effects of price controls, particularly with respect to crude oil prices. Accordingly, May was chosen as the most appropriate reference point to determine historical margins under a system of price controls designed to "freeze" prices at a time that approximated free market conditions, and to allow a dollar-for-dollar pass through of increased product costs,

incurred since that time. Although another date, January 10, 1973, was initially selected as a basis for the historically margins under the price regulations applicable to resellers and retailers, May 15, 1973 was ultimately selected as the best single date on which to base the price controls applicable to all sectors of the petroleum industry.

In the case of natural gas liquids, however, the FEA has concluded that May 15, 1973 selling prices of individual firms do not in some cases reflect a stable price situation based on relatively free market conditions, nor do they necessarily reflect historical margins. Propane prices, for example, ranged between 4 and 22 cents per gallon on May 15, 1974. This 18 cent spread in prices represented a substantial departure from more typical market conditions, and reflected the fact that some firms had changed their prices, while others had not. The price spread for propane in August, 1971, for example, was only 6.5 cents per gallon, and reflected a more normal market situation. In many cases the low May 15, 1973 prices of certain sellers were in large part the result of economic controls that began under the Council's Phase I freeze of August, 1971.

The FEA also recognizes that May 15, 1973 propane prices reflect a seasonal demand reduction for that product, in many instances. To date, the FEA has received several requests for exceptions to the price regulations, citing the inequity of determining current lawful prices on the basis of atypically low prices that were in effect on May 15, 1973, for some sellers, but not for others.

The FEA has determined that the arithmetic average of the prices for which some fifty firms were selling propane on May 15, 1973 represents a price level that is more representative for purposes of determining allowable

prices, than are the individual prices of each firm. Therefore, those firms that were selling at lower prices than the arithmetic average price, which is more representative of the essentially free market prices upon which the regulations are intended to be based, will be permitted to use an adjusted "free market" May 15, 1973 price, for purposes of FEA price regulations.

The FEA has concluded that a conservative but appropriate adjusted May 15, 1973 price for propane, which may be used by any firm in lieu of its actual May 15, 1973 selling price for propane, is 8.5 cents per gallon. This figure is based in part on the arithmetic average of the prices of some fifty firms for propane on May 15, 1973, which was 9.03 cents per gallon. Also, the Cost of Living Council collected comprehensive data on the selling prices of propane in August, 1973. Since all prices were frozen on June 13, 1973, by the Council, and since propane prices typically do not increase in summer months, the arithmetic average August price of 8.91 cents per gallon should also be indicative of average May 15, 1973 prices. However, the price range by August had been reduced to 11.7 cents per gallon, which further indicates that prices were in a state of transition on May 15, 1973.

Permitting the use of this adjusted May 15, 1973 "free market" price for propane is analogous to the crude oil ceiling price regulation, which does not limit each producer of crude oil to a price based on the price actually charged by that producer in sales of its crude oil on May 15, 1973. Rather, producers' prices for domestic crude oil are based on "the highest posted price . . . [on] May 15, 1973, for that grade of crude petroleum at that field . . ." (10 CFR 212.73(b)).

Thus, in order to obviate the necessity of dealing with this problem through exceptions on a case-by-case basis, and in light of the fact that average prices for propane

were at a level of somewhat more than 8.5 cents per gallon on May 15, 1973, the FEA has determined that, in calculating the weighted average price at which propane was lawfully priced in transactions on May 15, 1973, for use in the price rule, a seller of propane in a first sale transaction may use the higher of its actual weighted average selling price per gallon on that date, or 8.5 cents per gallon. This provision should help insure that all processors of natural gas will have margins comparable to historical levels—thus providing a continuing incentive to produce natural gas liquid products.

The FEA has further determined that, in view of the fact that prices for butane and natural gasoline have historically exceeded the price of propane by an average of 0.5 cents per gallon for butane and 1.5 cents per gallon for natural gasoline, the May 15, 1973 prices which may be used for these two products for purposes of the price regulations will be the higher of the actual price on that date for each product, or 9 cents per gallon for butane and 10 cents per gallon for natural gasoline.

These provisions with respect to adjusted May 15, 1973 prices are intended to remove inequities that have resulted from non-representative May 15, 1973 prices. Although not intended primarily as a measure to reduce current price disparities, this provision should also tend to alleviate the price disparity problem in the marketing sector of the propane industry.

IV. *Non-product cost allowance.* The FEA recognizes that processors of natural gas liquids may be incurring increased costs of operations, such as rent, labor, interest, etc., which cannot be accounted for as increased natural gas shrinkage costs. The FEA does not, however, have sufficient data to determine the extent of these cost increases, on an average industry-wide basis.

The FEA has concluded that the differences in gas plant operations from those of crude oil refinery operations justify a somewhat different treatment of non-product costs. Particularly in view of the large number of gas plants and the fact that many of them are not under the ownership of a single legal entity, the FEA has concluded that regulations to provide for the computation and the pass-through of increased non-product costs on a plant-by-plant, or even a firm-by-firm basis, in the manner of the recently amended non-product cost pass-through regulations which are generally applicable to refiners (§ 212.87), is impracticable and would present an unreasonable administrative burden if applied to all gas plants. In view of the foregoing, the FEA has determined that actual increased non-product costs of operating gas processing plants may be passed through in prices charged for natural gas liquids, provided that not more than 0.5 cents per gallon will be permitted to be added to the May 15, 1973 selling price of natural gas liquid products, in recognition of increased non-product costs incurred since that date. Gas plant operators will be required to maintain records to justify non-product cost increases, just as they will be required to do with respect to product cost increases, and the pass through of increased non-product costs by refiners that process natural gas and refine crude oil will be subject to the profit margin limitations of Subpart E.

Any firms that have increased non-product costs of gas processing that would justify a greater price increase than 0.5 cents per gallon may request permission to charge higher prices, on a case-by-case basis through the exceptions process.

V. *Increased cost of natural gas shrinkage.* — For natural gas processing, the equivalent of increased product cost is the increase in the cost of the "shrinkage"

which occurs in the natural gas stream from which the liquids are extracted, as a result of the extraction of the liquids. The "cost" of such shrinkage is the reduction in sales revenues received from the natural gas because of the reduced gas volume or BTU content of the gas after processing. Where the price permitted to be charged for natural gas has increased since May 15, 1973, an increased cost of "shrinkage" resulting from extraction of the liquids has been the result. The FEA has determined that this cost increase is the equivalent of increased product cost, and shall therefore be permitted to be passed through in the prices charged for natural gas liquid products so that the economic incentive to remove the liquids from the natural gas stream will not be lost.

The cost of shrinkage shall be computed based upon the contractural terms in effect for the sale of natural gas during the time period for which shrinkage cost is being measured. Thus, in those cases where the natural gas processed is or was sold under contracts at prices based on BTU value, the cost of "shrinkage" is to be computed based on the reduction in sales revenues from natural gas because of reduced BTU value attributable to gas processing, and where the natural gas processed is or was sold under contracts at prices based on the volume of gas, the cost of "shrinkage" is to be computed based on the reduction in sales revenues from natural gas sales because of reduced volume attributable to gas processing.

Thus, any selling prices for natural gas liquid products which exceed the adjusted May 15, 1973 price for the product, plus the 0.5 cents per gallon allowed for increased nonproduct costs, must be justified by increased natural gas shrinkage costs. The pass-through of increased shrinkage costs will permit continuing price disparities, particularly as long as the wide disparity in prices being charged for interstate sales and for

intrastate sales of natural gas persists. However, as was noted above, this type of regulation will permit the full cost of processing higher priced natural gas to be passed through and, to the extent that the prices of natural gas begin to move closer to the prices of crude oil, on a BTU basis, the problem of price disparities between crude oil derived products and natural gas liquid products will be alleviated, without the need for any action by FEA.

Gas plant operators will be required to maintain records to establish the amount of increased shrinkage costs attributable to the gas they process. The total increased shrinkage cost attributable to the entire volume of natural gas processed to obtain a given volume of natural gas liquids may be attributed to the prices charged for those liquids in a first sale, without regard to which entity actually retains title to the natural gas, and therefore "incurs" an increased shrinkage cost by virtue of reduced natural gas sales revenues. This approach avoids the complexities inherent in attempting to allocate the shrinkage costs pursuant to the wide variety of contractual terms that are in existence, and is consistent with the application of a "first sale" price rule which leaves the parties to "net-back" sale arrangements free to allocate the revenues from first sales of natural gas liquid products as they see fit.

Because the amount of increased shrinkage costs and volumes of natural gas liquids to which those costs are attributable are relatively stable, such costs may be added to prices on a current basis. This will contribute to administrative simplicity. Gas processors will simply be required, for each month, to establish that the increased shrinkage costs for that month justify the prices charged in that month. Increased shrinkage costs not recovered in one month may be carried forward for recovery in a subsequent month.

Where different volumes of natural gas processed in the same gas plant are subject to separate contracts for sale, and have different increased shrinkage costs, the increased costs attributable to a particular volume of natural gas may be allocated directly to the prices charged for the liquids extracted from that volume of gas, or the total amount of increased shrinkage costs attributable to all natural gas processed in a plant may be allocated to the total volume of liquids extracted from that gas. Whichever method of cost allocation is used, no more than a volumetrically proportional share of the available increased costs may be allocated to prices charged for propane.

VI. *Unequal application among classes of purchaser of increased costs to determine prices for propane.* FEA price regulations require generally that the amount of increased product costs used in determining prices charged for a particular product be equally applied to the May 15, 1973 selling price to each class of purchaser of that product. In the September 10 Notice, the FEA proposed a relaxation of this requirement, for all products, in order to restore a measure of pricing flexibility that is not currently available under the price regulations. The September 10 Notice proposed to eliminate the equal application requirement, except to the extent that is is necessary to protect the independent sector of the market. The FEA has not yet completed its analysis of this proposal as to the pricing of covered products in general, but it has concluded that a revision to its regulations in this regard for propane prices is appropriate at this time, in light of the special considerations which affect the prices of this product.

In revising the equal application of increased cost requirement for propane prices, the FEA will, as proposed in its September 10 Notice, afford protection for

independent marketers by requiring that the smallest increment of increased product cost be applied to prices charged to any class of purchaser that includes an independent marketer. In addition, that same restriction will be extended to include prices charged in sales to any class of purchaser that includes residential users.

Although no limitation was proposed on the extent of the difference in amounts of increased product costs that could be applied to the May 15, 1973 selling price to different classes of purchaser under this revision, the FEA has concluded that there should be such a limitation, at least initially. Accordingly, under the new regulation, the greatest amount of increased product cost added to the May 15, 1973 selling price of propane to a particular class of purchaser may not exceed the smallest amount of increased product cost added to the May 15, 1973 selling price of propane to any other class of purchaser by more than 100 percent. Thus, if a seller had May 15, 1973 weighted average selling prices of 9 cents per gallon to a class of purchaser that included an independent marketer, and of 11 cents per gallon to another class of purchaser, and that seller added increased costs of 5 cents per gallon to determine a current selling price of 14 cents per gallon to the class of purchaser that included an independent marketer, the highest amount of increased costs that it could add to its May 15, 1973 selling price to the other class of purchaser would be 10 cents per gallon, which would result in a selling price in this example to that class of purchaser of 21 cents per gallon.

These revisions to the price regulations for propane are intended to help preserve reasonable price levels for propane used by residential users, and at the same time to help forestall some of the excessive demand for this product from so-called "non-traditional" users, which could be intensified by the availability to such users of the

product at prices which are based solely on natural gas prices, and which would therefore typically be less than prices for BTU equivalent crude petroleum derived fuels. This provision should also serve to make additional propane available through imports, by facilitating the pass through of the higher cost of imported product, especially to industrial and utility users of propane, which are in a better position to meet the higher cost of imported product than are residential users.

VII. *Separate calculation of revenues from natural gas liquid product sales by refiners that refine crude oil and process natural gas.* The FEA has become aware of the significant problem currently faced by independent natural gas processors that do not refine crude oil in obtaining new supplies of natural gas for processing. Since natural gas producers and royalty owners traditionally receive a percentage of the selling price of the liquid products, they seek to commit their natural gas to the processor that has the highest lawful selling price for those products, in order to maximize their return. And since those refiners that also refine crude oil are permitted to determine selling prices for products under a method that reflects the increased cost of crude oil, while independent natural gas processors do not have increased crude oil costs, the lawful selling prices of such refiners are generally higher than those of natural gas processors.

The FEA is therefore amending its regulations in order specifically to provide that the revenues received in sales of natural gas liquid products shall be reduced by the amount of increased crude oil costs that were recovered in such sales, for purposes of determining netback revenues.

This provision necessarily overrides any contractual provisions that are inconsistent with it. It should be noted, also, that any contractual provisions that depend upon "posted" or "market" prices would be generally

inoperative, since the operation of the FEA cost-based price regulations replaces "market prices" with maximum lawful prices, which depend upon the differing costs attributable to various sellers.

VIII. *Prices for natural gas liquid products from gas plants that have been placed in operation since May 15, 1973, and for new gas plants constructed after the effective date of this regulation.* Prices for natural gas liquids products produced in gas plants that were placed in operation after May 15, 1973, and therefore did not have a May 15, 1973 selling price, may be computed on the basis of the adjusted May 15, 1973 prices for natural gas liquid products specified by these regulations. In addition, increased natural gas shrinkage costs may be computed on the basis of a May 15, 1973 selling price for natural gas of 23 cents per thousand cubic feet (MCF) for gas with a BTU content of 100 BTUs per cubic foot (CF), which represents the average price of natural gas sold in interstate sales on that date.

With respect to gas plants on which contruction is begun after the effective date of this regulation, the same May 15, 1973 imputed price for natural gas shall be used for computing increased shrinkage cost. However, higher imputed May 15, 1973 prices of 12 cents per gallon for propane, 12.5 cents per gallon for butane, and 13.5 cents per gallon for natural gasoline may be used. The additional 3.5 cents per gallon with respect to May 15, 1973 prices, to be used in computing lawful prices for natural gas liquid products produced in new gas plants is intended to provide an incentive for the construction of new plants, and thereby to maximize supply. Comments are requested with respect to this provision of the regulations, and if this incentive is not regarded as sufficient, data to support the need for any further incentive should be submitted.

The maximization of extraction of liquids from existing plants, through providing price incentives for plants modernization and expansion, is also an objective of the FEA. The FEA does not have on hand sufficient data to determine either the criteria by which increased extraction can be appropriately measured, or what the needed incentives to achieve further liquid extraction would be. It may be possible, for example, to provide by regulation that where the percentage of propane extracted from the natural gas stream by a particular gas plant is increased by a certain percentage, a special additional price per gallon of product produced in that plant could be charged. Comments are also requested on this issue.

IX. *Relationship to allocation regulations.* The cost-based regulations adopted today continue to relate the prices of natural gas liquid products to the prices of the natural gas from which they are extracted. To the extent that natural gas prices are regulated at less than the equivalent BTU prices of crude oil, natural gas liquid products will be priced at levels which represent generally a lower price per BTU than fuels derived from crude petroleum.

The argument that natural gas liquid prices must be priced on a BTU equivalence basis with crude oil derived products, in order to avoid additional price-stimulated, demand on a diminishing quantity of natural gas liquid products, is a forceful one. The FEA has concluded, however, that in the present circumstances the allocation regulations offer the most appropriate method of dealing with this problem.

One aspect of this problem that was repeatedly raised in this proceeding was the assertion that refiners would turn to propane for use as a refinery fuel, unless propane were permitted to be priced at the same level per BTU as fuels derived from crude petroleum.

The authority of the FEA to allocate petroleum products is fully adequate to limit this, however. Refiners, like other industrial users of fuel, are subject to limitations in their use of propane as a source of fuel. An appropriate regulatory changes is being issued, on an emergency basis, to prevent the possibly excessive use of propane as refinery fuel.

The regulations issued today are predicated in large part on the proposition that natural gas liquids and natural gas liquid products are being processed and distributed in a manner that reflects historical supplier-purchaser relationships. Should it appear that new relationships are being created with the intent to avoid the impact of the price regulations, revision to the allocation regulations, or other appropriate steps by FEA, will be taken.

Written Comment Procedures

Interested persons are invited to submit data, views or arguments with respect to the specific matters concerning incentives for new and expanded gas processing facilities upon which comments have been solicited to Executive Communications, Federal Energy Administration, Box BO, Washington, D.C. 20461. Ten copies of each comment should be submitted, and should be indentified on the outside envelope and on documents submitted to Executive Communications with the designation "Further Comments on Mandatory Petroleum Price Regulations." All comments received by January 15, 1975, and all relevant information will be considered by FEA in this connection.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-150; Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11700, 39 FR 23185).

In consideration of the foregoing, Part 212 of Chapter II, Title 10 of the Code of Federal Regulations, is amended as set forth bellow, effective January 1, 1975.

Issued in Washington, D.C., December 19, 1974.

ROBERT E. MONTGOMERY, JR.,
General Counsel, Federal Energy Administration.

1. Section 212.31 is amended in the definition of "producer" to read as follows:

§ 212.31 Definitions.

* * *

"Producer" means a firm or that part of a firm which produces crude petroleum or natural gas, or any firm which owns crude petroleum or natural gas when it is produced.

* * *

2. Section 212.81 is revised to read as follows:

§ 212.81 Applicability.

This subpart applies to each sale of a covered product which is purchased or refined by a refiner, except as provided in Subparts F and K.

3. Section 212.83 is amended in paragraph (c)(1)(iii) and is further amended by adding paragraphs (c)(1)(v) to read as follows:

§ 212.83 Allocation of refiners' increased costs.

* * *

(c) *Allocation of increased product costs*—(1) *General rule.*

* * *

(iii) *Special propane rule.* Notwithstanding the provisions of § 212.83(c)(1)(ii)and § 212.83(e), a refiner in computing base prices for propane for the twelve month period of August 1, 1974 through July 31, 1975:

(A) May not apportion to propane a greater percentage of increased cost of crude petroleum purchased or landed in the twelve month period July 1, 1974, through June 30, 1975, than the percentage that the volume of propane sold during the twelve month period August 1, 1974, through July 31, 1975, which was produced by that refiner from crude petroleum is to the total volume of all products (including other than covered products) sold by it during the same twelve month period, which were produced by that refiner from crude petroleum. Notwithstanding § 212.83(b), for purposes of this special propane rule, cost of crude petroleum shall not include the cost of natural gas liquids; and

(B) May apportion to propane the increased cost of propane purchased or landed in the twelve month period of July 1, 1974, through June 30, 1975; and

(C) May apportion to propane the increased product costs attributable to propane produced from natural gas as determined pursuant to the provisons of § 212.146 of Subpart K of this part; and

(D) May not apportion to propane any increased product costs incurred prior to July 1, 1974, and not recovered through July 31, 1974.

* * *

(7) *Exception to equal application rules for propane.* Notwithstanding the provisions of paragraphs (c)(1)(i) and (ii) of this section, a refiner may comply with the provisions of this paragraph by applying unequal amounts of increased costs to the weighted average May 15, 1973

selling price of propane to classes of purchaser of propane, *provided,* That the highest amount of increased cost applied to the weighted average May 15, 1973 selling price to any class of purchaser shall not exceed by more than 100 percent the amount of increased cost applied to the weighted average May 15. 1973 selling price to any other class of purchaser, and, *provided further,* That no greater amount of increased cost shall be applied to the weighted average May 15, 1973 selling price of propane in sales to any class of purchaser which includes either an independent marketer, as defined in §211.51 of this Chapter, or a purchaser that uses the product for residential use, as defined in §211.51 of this Chapter, than is applied to the weighted average May 15, 1973 selling price of propane in sales to any other class of purchaser.

5. Section 212.93 is amended by redesignating paragraphs (f) and (g) as (g) and (h), respectively, and by adding a new paragraph (f) to read as follows:

§ 212.93 Price rule.

* * *

(f) *Exception to equal application rules for propane.* Notwithstanding the provisions of paragraph (c) above a seller may comply with the provisions of this section by applying unequal amounts of increased costs to the weighted average May 15, 1973 selling price of propane to classes of purchaser of propane, *provided,* That the highest amount of increased cost applied to the weighted average May 15, 1973 selling price to any class of purchaser shall not exceed by more than 100 percent the amount of increased cost applied to the weighted average May 15, 1973 selling price to any other class of purchaser, and *provided further,* That no greater amount of increased cost shall be applied to the weighted average May 15, 1973 selling price of propane in sales to any class

of purchaser which includes either an independent marketer, as defined in § 211.51 of this Chapter, or a purchaser that uses the product for residential use, as defined in § 211.51 of this Chapter, than is applied to the weighted average May 15, 1973 selling price of propane in sales to any other class of purchaser.

* * *

6. A new Subpart K is added to Part 212 to read as follows:

Subpart K—Natural Gas Liquids

Sec.

212.141 Applicability and relationship, to other subparts.
212.142 Definitions.
212.143 General price rule.
212.144 Adjusted May 15, 1973 first sale price.
212.145 Increased non-product costs.
212.146 Increased product costs.
212.147 Allocation of increased product costs.
212.148 Increased product costs for natural gas liquid products from gas plants that began operation after May 15, 1973.
212.149 Net-back calculations.
212.150 Records required to be maintained.

AUTHORITY: (Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159; Federal Energy Administration Act of 1974. Pub. L. 93-275; E.O. 11790, 39 FR 23185).

Subpart K—Natural Gas Liquids

§ 212.141 Applicability and relationship to other Subparts.

(a) *Scope.* This subpart applies to all sales of natural gas liquids and natural gas liquid products, including transfers between affiliated entities, by all firms, including gas plant operators, producers of natural gas, natural

gas royalty owners, and refiners except sales by resellers or retailers, which are subject to Subpart F of this part.

(b) *Relationship to other Subparts*—(1) *Gas plant operators.* Refiners that only refine liquid hydrocarbons from oil and gas field gases and do not refine crude petroleum shall determine their maximum lawful prices pursuant to this Subpart K and are not also subject to Subpart E.

(2) *Crude oil refiners which are also gas plant operators*—(i) *General.* Refiners that refine liquid hydrocarbons from oil and gas field gases, and also refine crude petroleum, shall determine their May 15, 1973 selling prices and increased costs for natural gas liquids and for natural gas liquid products produced in gas plants pursuant to this subpart, but shall determine their maximum lawful selling prices pursuant to Subpart E.

(ii) *Calculation of increased product costs.* Such refiners shall calculate the increased product costs of all natural gas liquids (except natural gas liquids which are separated from natural gas at the well head of an oil well, and purchased as crude oil) and the increased product costs attributable to natural gas liquid products pursuant to §§ 212.146 and 212.147 of this subpart, and shall add the amount of increased product costs so determined to the amount of increased product costs incurred in each month of measurement and determined to be allocable to other than special products under the refiner's cost allocation formulae of § 212.33(c)(1), provided that the amount of such increased product costs allocable to propane prices is limited pursuant to the provisions of § 212.147(c) and § 212.83(c)(1)(iii).

(iii) *Calculation of increased non-product costs.* Such refiners shall calculate increased non-product costs attributable to natural gas processing pursuant to

§ 212.145, and shall add the amount of increased non-product costs so determined to the amount of increased non-product costs incurred in each month of measurement and determined to be allocable to prices charged for covered products pursuant to § 212.87(b), provided that the inclusion of such increased non-product costs determined pursuant to § 212.145 in prices charged by such refiners shall constitute the charging of an allowable price in excess of base price which will make such refiners subject to the profit margin limitation of § 212.32(d).

(c) *Sales of ethane.* This subpart does not apply to sales of ethane.

§ 212.142 Definitions.

For purposes of this subpart–

"Cost of natural gas shrinkage" means the reduction in selling price per thousand cubic feet (MCF) of natural gas processed, which is attributable to the reduction in volume or BTU value of the natural gas resulting from the extraction of natural gas liquids, as determined pursuant to the contract in effect at the time for which cost of natural gas shrinkage is being measured, and under which the processed natural gas is sold.

"First sale" means, with respect to natural gas liquids or natural gas liquid products, the first transfer for value to a class of purchaser for which a fixed price per unit of volume is determined.

"Gas plant" means a facility in which natural gas liquids are separated from natural gas, or in which natural gas liquids are fractionated or otherwise separated into natural gas liquid products, or both.

"Gas plant operator" means any firm, including a gas plant owner, which operates a gas plant and keeps the gas plant records.

"Gas plant owner" means any firm with an ownership interest in a gas plant.

"Groundbreaking" means the date on which the actual physical contruction of a gas plant is undertaken.

"Natural gas liquids" means a mixed hydrocarbon stream containing, in whole or in substantial part, mixtures of ethane, butane (iso-butane and normal butane), propane or natural gasoline.

"Natural gas liquid products" means the separate products derived from natural gas liquids, including butane (iso-butane and normal butane), propane, propane-butane mixtures, and natural gasoline, but not ethane.

"Net-back sale" means, with respect to natural gas liquids, any transfer for value to a class of purchaser for which a percentage of the revenues from the first sale of natural gas liquids or natural gas liquid products is received.

§ 212.143 General price rule.

(a) *First sale.* A royalty owner, producer, gas plant owner, gas plant operator or other entity may not charge to (or receive from) any class of purchaser a price in excess of the weighted average price at which natural gas liquids or natural gas liquid products were lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, except to the extent permitted by this subpart.

(b) *Net-back sale.* A royalty owner, producer, gas plant owner, gas plant operator, or other entity that transferred natural gas liquids or natural gas liquid products to any class of purchaser on May 15, 1973, in a net-back sale shall not charge (or receive) per gallon revenues for such natural gas liquids or natural gas liquid products in excess of the per gallon revenues received in such net-

back sales on May 15, 1973, except to the extent that the first sale price upon which the net-back amount is determined is permitted to increase above its May 15, 1973 level pursuant to this subpart, and except to the extent that the method for determining the amount of the net-back is changed, provided, however, that any change in the method of determining the amount of any net-back shall not constitute an increased product cost or an increased non-product cost.

§ 212.144 Adjusted May 15, 1973 first sale price.

(a) *Natural gas liquid products.* For purposes of determining lawful prices of natural gas liquid products in a first sale pursuant to this subpart, a firm may use, in lieu of the weighted average price at which natural gas liquid products were lawfully priced in first sale transactions with a class of purchaser on May 15, 1973, prices of not more than $.085 per gallon for propane, not more than $0.09 per gallon for butane, and not more than $.10 per gallon for natural gasoline.

(b) *Natural gas liquids.* For purposes of determining lawful prices of natural gas liquids in a first sale, if the first sale price was determined on May 15, 1973 by reference to first sale prices of natural gas liquid products, less a specified percentage or amount to take into account the costs of further processing needed before the natural gas liquids could be sold separately as natural gas liquid products, a firm may use, in lieu of the actual May 15, 1973 selling prices for natural gas liquid products which were used to determine first sale prices of natural gas liquids on May 15, 1973, first sale prices of not more than $.085 per gallon for propane, not more than $.09 per gallon for butane and not more than $.10 per gallon for natural gasoline, provided that the first sale price of natural gas liquids shall be reduced by same percentage or amount from these adjusted first sale prices for natural

gas liquid products as it was from the actual May 15, 1973 selling prices of natural gas liquid products, which served as the reference for determining the May 15, 1973 first sale price of natural gas liquids.

(c) *Imputed May 15, 1973 first sale prices for natural gas liquid products from new gas plants where groundbreaking did not occur until January 1, 1975, or thereafter.* For purposes of determining lawful prices of natural gas liquid products produced in a gas plant where groundbreaking did not occur until January 1, 1975, or thereafter, a firm may use as the weighted average price at which natural gas liquid products were lawfully priced in first sale transactions on May 15, 1973, prices of not more than $.12 per gallon for propane, not more than $.12.5 per gallon for butane, and not more than $13.5 per gallon for natural gasoline.

§ 212.145 Increased non-product costs.

The first sale price of natural gas liquid products may be increased by an amount which is not in excess of $.005 per gallon in excess of the amount otherwise permitted to be charged pursuant to the provisions of this subpart, to reflect non-product cost increases which have been incurred since May 15, 1973: *provided,* That, records are maintained to show the increased non-product costs attributable to gas plant operations, under the customary accounting procedures generally accepted and historically and consistently applied by the firm concerned, are sufficient to justify the amount of the price increase on a dollar-for-dollar pass through basis.

§ 212.146 Increased product costs.

(a) The first sale price of natural gas liquids or natural gas liquid products may be increased in each month as provided in § 212.147 to reflect, on a dollar-for-dollar

basis, increased product costs since May, 1973 attributable to the production of such natural gas liquids or natural gas liquid products.

(b) Increased product costs are (1) the difference between the weighted average cost per gallon of natural gas liquids purchased in a first sale in the month of May 1973, and the weighted average cost per gallon of natural gas liquids purchased in a first sale in the current month multiplied by the number of gallons of natural gas liquids purchased in the current month, plus (2) the difference between the weighted average cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the month of May 1973, and the weighted average cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the current month, multiplied by the number of thousand cubic feet (MCF's) of natural gas processed in the current month.

§ 212.147 Allocation of increased product costs.

(a) *Exclusion of increased product costs attributable to ethane.* The total amount of increased product costs attributable each month to a given volume of natural gas shall be reduced each month by an amount equal to the product of the increased product costs multiplied by

$$(V_o^n/V^n)$$

where:

V^n=The total volume of all natural gas liquid products and ethane derived from that volume of natural gas and sold in the current month, and

V_o^n=The total volume of all ethane derived from that volume of natural gas and sold in the current month.

(b) *Aggregation of increased product costs.* Where increased product costs measured with respect to particular volumes of natural gas or natural gas liquids processed in

a gas plant in a month are different, (i) the increased product costs measured with respect to a particular volume of natural gas may be allocated to the particular sales volumes of natural gas liquid products which is produced therefrom; or, in the alternative, (ii) the total amount of increased product costs measured with respect to the total amount of natural gas and natural gas liquids processed in a gas plant in a month may be allocated to the total sales volume of natural gas liquid products produced from all volumes of natural gas and natural gas liquids processed in that gas plant.

(c) *Increased product costs allocable to propane.* The total amount of increased product costs allocable to the price of propane derived from a particular volume of natural gas shall not exceed the amount of increased product cost determined pursuant to paragraphs (a) and (b) of this section to be attributable to that volume of natural gas and allocable to the sales volume of natural gas liquid products derived therefrom, multiplied by

$$(V_a^n/V_p^n)$$

where:

V_a^n=The total volume of all natural gas liquid products derived from that volume of natural gas and sold in the current month, and

V_p^n=The total volume of propane derived from that volume of natural gas and sold in the current month.

(d) *Allocation of increased product costs among classes of purchaser.* In computing maximum lawful prices for sales of natural gas liquid products other than propane, the amount of increased product cost allocable to such products pursuant to this section shall be equally applied to each class of purchaser. The total amount of increased product costs allocable to natural gas liquid products may

be apportioned among natural gas liquid products, other than propane, in whatever amounts are deemed appropriate. In computing maximum lawful prices for sales of propane, unequal amounts of increased product costs may be applied to different classes of purchaser, *provided,* That the highest amount of increased product cost applied to the weighted average May 15, 1973 selling price to any class of purchaser shall not exceed by more than 100 percent the amount of increased product cost applied to the weighted average May 15, 1973 selling price to any other class of purchaser, and, *provided further,* That no greater amount of increased product cost can be applied to the weighted average May 15, 1973 selling price of propane in sales to any class of purchaser which includes an independent marketer, as defined in § 211.51 of this Chapter, or a purchaser that uses the product for residential use, as defined in § 211.51 of this Chapter, than is applied to the weighted average May 15, 1973 selling price of propane to any other class of purchaser.

(e) *Carry-forward of unrecovered increased product costs.* Increased product costs calculated pursuant to this section and not recovered in sales revenues in the current month may be carried forward for recovery in a subsequent month, *provided,* That such unrecovered increased product costs shall be allocated to prices as provided in this section, and, *provided further,* That to the extent any sales revenues in any current month recover in excess of the amount of increased product costs calculated pursuant to this section, such amounts shall be subtracted from the amount of increased product costs otherwise available to be allocated to prices in the following month.

§ 212.148 Increased product costs for natural gas liquid products from gas plants that began operation after May 15, 1973.

For purposes of determining increased product costs attributable to natural gas liquid products produced in a gas plant that began operation after May 15, 1973, a firm shall use a May 15, 1973 price of natural gas of 23 cents per thousand cubic feet (MCF) for 1000 BTU per cubic foot natural gas.

§ 212.149 Net-back calculations.

For purposes of calculating net-back revenues, revenues from sales of natural gas liquid products shall exclude any amounts that represent recoupment of increased cost of crude oil, provided for pursuant to Subpart E.

§ 212.150 Records required to be maintained.

Prices otherwise permitted to be charged pursuant to this subpart to reflect increased product cost and increased non-product costs shall not be charged unless records adequate to demonstrate such increased product costs and increased non-product costs are maintained. The FEA will treat gas plant operators as responsible in the first instance for maintaining such records, without, however, relieving gas plant owners and other entities subject to these regulations of the responsibility for compliance with these regulations. Where one or more gas plants are under common ownership, the records required by this section may be kept in the aggregate for all of the gas plants concerned.

[FR Doc.74-30006 Filed 12-19-74; 4:41 pm]

APPENDIX F

PROCEDURAL REGULATIONS

RULES AND REGULATIONS

Subpart C — Exceptions

§ 205.41 Purpose and scope.

Exceptions from the provisions of Parts 210, 211 and 212 may be granted for the purpose of preventing or correcting a serious hardship or gross inequity. This Subpart establishes the rules governing the disposition of requests for exceptions.

§ 205.42 Initial action by FEO.

After considering the matter, FEO will make a decision and issue an appropriate order:

(a) When FEO grants an exception it will serve upon the applicant a copy of its order.

(b) When FEO denies an exception in whole or in part, it will serve upon the petitioner a copy of its order, which will contain a statement of the grounds for denial, and advise the applicant that he may file an appeal pursuant to Subpart H of this Part.

§ 205.43 Appeals.

Any person aggrieved by an initial action of FEO under this subpart may file an appeal pursuant to Subpart H of this part. A person appearing before FEO has not exhausted his administrative remedies until he has filed an appeal under Subpart H and final action has been taken thereon by FEO.

Subpart H — Appeals

§ 205.141 Purpose and scope.

(a) This subpart establishes the procedures governing appeals of initial actions taken under Subparts B, C, D, E, F, G or I of this part.

(b) A person who has appeared before FEO in connection with a matter arising under Subparts B, C, D, E, F, G or I of this part has not exhausted his administrative remedies until he has filed an appeal under this subpart and final action thereon has been taken by FEO.

§ 205.142 Who may file an appeal.

Any person aggrieved by an initial action of the FEO under Subpart B, C, D, E, F, G or I of this part may file an appeal under this subpart.

§ 205.143 Where to file.

An appeal shall be filed with the FEO office which issued the initial action or decision from which appeal is made.

§ 205.144 When to file.

An appeal must be filed within 30 days of service of the initial action or decision from which appeal is made.

§ 205.145 Contents of request.

An appeal shall:

(a) Be in writing and signed by the appellant;

(b) Be designated clearly as an appeal;

(c) Contain a concise statement of the grounds for appeal and the requested relief;

(d) Be accompanied by briefs, if any; and

(e) Be marked on the outside of the envelope "Appeal".

§ 205.146 Reconsideration.

(a) FEO will modify its initial action taken under Subparts B, C, D, E, F, G, or I of this part if an appeal:

(1) Is made by a person aggrieved by the initial action;

(2) Is timely; and

(3) Makes a prima facie showing that FEO's initial action was erroneous in fact or in law.

(b) FEO may summarily reject an appeal which is not timely.

(c) FEO may summarily reject an appeal which fails to make a prima facie showing that FEO's initial action was erroneous in fact or in law, in which case it will notify the appellant of its action. Such appellant may seek judicial review under the Act.

(d) When an appeal meets the requirements set forth in paragraph (a) of this section FEO will proceed in accordance with §§ 205.147 and 205.148 of this subpart.

(e) FEO on its own motion may consider any additional evidence that it deems relevant and which in its opinion the appellant did not have a reasonable opportunity to present previously.

§ 205.147 Hearing.

(a) If FEO in its discretion deems that a hearing or conference is advisable, it will, as expeditiously as possible after receiving an appeal, direct that a hearing or conference be held before a Hearing Officer or other agency official.

(b) When a hearing or conference has been directed in accordance with paragraph (a) of this section it will be conducted promptly after written notice has been served on the appellant, at such time and place as FEO may direct.

(c) When a hearing is conducted in accordance with this section, the appellant may present oral argument and submit such additional documentary evidence as the Hearing Officer or other official allows.

(d) When administratively feasible, within 30 days after the close of the hearing, the Hearing Officer or other official will submit to FEO a report and any recommendation he deems appropriate with respect to the appellant's appeal.

§ 205.148 Decision by FEO.

(a) After considering the matter FEO will make a decision and issue an appropriate order.

(b) When an order grants the requested relief, a copy of the order will be served upon each party to the proceedings.

(c) When the order denies the requested relief in whole or in part, FEO will set forth the grounds therefor, and advise appellant that he has exhausted his administrative remedies.

§ 205.149 Stays pending appeal.

As part of an appeal, any person may request a stay of the initial action for which appeal is sought pending final disposition of the appeal. FEO may grant a request for stay for good cause shown.

§ 205.150 Judicial review.

A final decision of an appeal taken pursuant to this subpart shall be subject to judicial review in the manner prescribed by section 211 of the Economic Stabilization Act of 1970, as amended (12 U.S.C. 1904 (Note)).

Subpart D — Exception

§ 205.50 Purpose and scope.

(a) This subpart establishes the procedures for applying for an exception from a regulation, ruling or generally applicable requirement based on an assertion of serious hardship or gross inequity and for the consideration of such application by the FEA.

(b) A request for an interpretation or other specific action which includes, or could be construed to include, an application for an exception may be treated solely as a request for an interpretation or other action, and processed as such by FEA.

(c) The filing of an application for an exception shall not constitute grounds for non-compliance with the requirements of the regulation, ruling or generally applicable requirement from which an exception is sought, unless a stay has been issued in accordance with Subpart I of this part.

§ 205.51 What to file.

(a) A person filing under this subpart shall file an "Application for Exception," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.52 Where to file.

(a) Except as provided in paragraph (b) of this section, all applications for exception shall be filed with the Office of Exceptions and Appeals at the address provided in § 205.12.

(b) All applications for exception to Part 212 that relate to the retail sale of motor gasoline, heating oil, diesel fuel, or propane shall be filed with the appropriate Regional Office at the address provided in § 205.12.

§ 205.53 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the applicant as a person who will be aggrieved by the FEA action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the FEA office with which the application was filed within 10 days. The application filed with the FEA shall include certification to the FEA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent.

The FEA may require the applicant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The FEA shall serve notice on any other person readily identifiable by the FEA as one who will be aggrieved by the FEA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

(d) Any person submitting written comments to the FEA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9 (f), to the applicant. The person shall certify to the FEA that he has complied with the requirements of this paragraph. The FEA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(e) At regular intervals, the FEA shall publish a list of all persons who have applied for an exception under this subpart, with a brief description of the factual situation and the relief requested.

§ 205.54 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the FEA action sought. Such facts shall include the names and addresses of all affected

persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application. When the application pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction shall be submitted.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and the FEA's determination regarding it shall be made in accordance with Subpart M of this part.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, FEA rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the particular action sought therein.

(d) The application shall specify the exact nature and extent of the relief requested.

§ 205.55 FEA evaluation.

(a) *Processing.* (1) The FEA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The FEA may solicit and accept submissions from third persons relevant to any application provided that the applicant is afforded an opportunity to respond to all

third person submissions. In evaluating an application, the FEA may consider any other source of information. The FEA on its own initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application.

(2) If the FEA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the FEA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the FEA may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 205.53, the FEA may dismiss the application without prejudice.

(b) *Criteria.* (1) The FEA shall only consider an application for an exception when it determines that a more appropriate proceeding is not provided by this part.

(2) An application for an exception may be granted to alleviate or prevent serious hardship or gross inequity.

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

(4) With regard to an exception from the provisions of Part 215 of this chapter, the criteria shall be those provided in such part.

§ 205.56 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the FEA shall issue an order granting or denying the application.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall provide that any person aggrieved thereby may file an appeal with the FEA Office of Exceptions and Appeals or the appropriate Regional Office in accordance with Subpart H of this part.

(c) The FEA shall serve a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the FEA as one who is aggrieved by such order. A copy of each order, with such modification as is necessary to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will be on file in the public docket room described in § 205.15. If such copy contains information that has been claimed by an applicant or other person to be confidential, notice of the FEA's intention to place a copy in the docket room and an opportunity to respond shall be given to such person no less than five days prior to its placement in such room. The Office of Exceptions and Appeals shall publish periodically a digest of all orders issued.

§ 205.57 Timeliness.

(a) When the FEA has received all substantive information deemed necessary to process any application filed under this subpart, the FEA shall serve notice of that fact upon the applicant and all other persons who received notice of the proceeding pursuant to the provisions of § 205.53; and if the FEA fails to take action on the application within 90 days of serving such notice, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the FEA fails to take action on the

application within 150 days from the filing of the application, the applicant may treat it as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 205.58 Appeal.

Any person aggrieved by an order issued by the FEA under this subpart may file an appeal with the FEA Office of Exceptions and Appeals or with the appropriate Regional Office in accordance with Subpart H of this part. The appeal must be filed within 30 days of service of the order from which the appeal is taken. There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subpart H — Appeal

205.100 Purpose and scope.

(a) This subpart establishes the procedures for the filing of an administrative appeal of FEA actions taken under Subparts B, C, D, E, F, G, or O of this part or Subpart I of Part 212 and the consideration of such appeal by the FEA. Appeals of orders issued by State Offices shall be in accordance with Subpart R.

(b) A person who has appeared before the FEA in connection with a matter arising under Subparts B, C, D, E, F, G, or O of this part or Subpart I of Part 212 has not exhausted his administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued.

§ 205.101 Who may file.

Any person aggrieved by an order or interpretation issued by the FEA under Subpart B, C, D, E, F, G or O of this part or Subpart I of Part 212 may file an appeal under this subpart.

§ 205.102 What to file.

(a) A person filing under this subpart shall file an "Appeal of Order" or an "Appeal of Interpretation," which should be clearly labeled as such both on the appeal and on the outside of the envelope in which the appeal is transmitted, and shall be in writing and signed by the person filing the appeal. The appellant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the appellant wishes to claim confidential treatment for any information contained in the appeal or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.103 Where to file.

(a) When the order upon which the appeal is based was issued by the FEA National Office, the appeal shall be filed with the Office of Exceptions and Appeals at the address provided in § 205.12.

(b) When the order upon which the appeal is based was issued by a Regional Office, the appeal shall be filed with that Regional Office at the address provided in § 205.12.

(c) When the appeal is based upon an interpretation, whether issued by the General Counsel or a Regional Counsel, the appeal shall be filed with the Office of Exceptions and Appeals of the address provided in § 205.12.

§ 205.104 Notice.

(a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the appellant as a person who will be aggrieved by the FEA action sought, including those who participated in the prior proceeding. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the FEA office with which the appeal was filed within 10 days. The appeal filed with the FEA shall include certification to the FEA that the appellant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the appeal was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an appellant determines that compliance with paragraph (a) of this section would be impracticable, the appellant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the appeal a description of the persons or class or classes of persons to whom notice was not sent.

The FEA may require the appellant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The FEA shall serve notice on any other person readily identifiable by the FEA as one who will be aggrieved by the FEA action sought and may serve notice on any other person that written comments regarding the appeal will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the FEA with respect to an appeal filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to the appellant. The person shall certify to the FEA that it has complied with the requirements of this paragraph. The FEA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 205.105 Contents.

(a) The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, FEA rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the appeal. If the appeal includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding. For purposes of this subpart, the term "significantly changed circumstances" shall mean —

(1) The discovery of material facts that were not known or could not have been known at the time of the prior proceeding;

(2) The discovery of a law, regulation, interpretation, ruling, order or decision on an appeal or an exception that was in effect at the time of the proceeding upon which the order or interpretation is based and which, if such had been made known to FEA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(3) A substantial change in the facts or circumstances upon which an outstanding and continuing order or interpretation affecting the appellant was issued, which change has occurred during the interval between issuance of the order or interpretation and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant.

(b) A copy of the order or interpretation that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether to the best of his knowledge the same or a related issue, act or transaction that is the subject of the appeal has been or presently is being considered or investigated by any FEA office, other Federal agency, department or instrumentality; or by a State Office, a state or municipal agency or court, or by any law enforcement agency; including, but not limited to, a consideration or investigation in connection with an FEA proceeding described in this part, other than the proceeding from which the appeal is taken. In addition, the appellant shall state whether contact has been made by the appellant or one acting on his behalf with any person who is employed by the FEA or any State Office subsequent to service of the order or interpretation that is being appealed with regard to the issue, act or transaction that is the subject of the appeal; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or

dates of the contact. An appellant shall comply with this paragraph in lieu of §205.9(e).

(d) The appellant shall state whether he requests or intends to request that there be a conference or hearing regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and the FEA's determination regarding it shall be made in accordance with Subpart M of this part.

§205.106 FEA evaluation.

(a) *Processing.* (1) The FEA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. The FEA may solicit and accept submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the FEA may consider any other source of information. The FEA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the FEA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the FEA may dismiss the appeal with leave to amend within a specified time. If the failure to supply additional information is repeated or willful, the FEA may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by §205.104, the FEA may dismiss the appeal without prejudice.

(3) *Failure to satisfy requirements.* (i) If the appellant fails to satisfy the requirements of paragraph (b)(1) of this section, the FEA may issue an order denying the

appeal. The order shall state the grounds for the denial and a copy of the order shall be served upon the appellant and any other person who participated in the proceeding.

(ii) The order denying the appeal shall become a final order of the FEA within 10 days of its service upon the appellant, unless within such 10-day period an amendment to the appeal that corrects the deficiencies identified in the order is filed with the Office of Exceptions and Appeals or the appropriate Regional Office.

(iii) Within 10 days of the filing of such amendment, as provided in paragraph (b)(1) of this section, the FEA shall notify the appellant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, that notice shall be an order dismissing the appeal as amended. Such order shall be a final order of the FEA of which appellant may seek judicial review.

(b) *Criteria.* (1) An appeal may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the FEA action was erroneous in fact or in law, or that it was arbitrary or capricious.

(2) The FEA may deny any appeal if the appellant does not establish that—

(i) The appeal was filed by a person aggrieved by an FEA action;

(ii) The FEA's action was erroneous in fact or in law; or

(iii) The FEA's action was arbitrary or capricious.

The denial of an appeal shall be a final order of FEA of which the appellant may seek judicial review.

§205.107 Decision and order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the FEA shall enter an appropriate order, which may include the modification of the order or interpretation that is the subject of the appeal.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall state that it is a final order of the FEA of which the appellant may seek judicial review.

(c) The FEA shall serve a copy of the order upon the appellant, any other person who participated in the proceeding and upon any other person readily identifable by the FEA as one who is aggrieved by such order.

(d) A copy of each order, with such modification as is necessary to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will be filed in the public docket room described in §205.15. If such copy contains information that has been claimed by an appellant or other person, to be confidential, notice of the FEA's intention to place a copy in the docket room and an opportunity to respond shall be given to such person no less than five days prior to its placement in such room.

§205.108 Appeal of a remedial order.

The appeal of a remedial order shall be in accordance with the procedures stated in this subpart, *except:*

(a) The appeal must be filed within 10 days of the service of the remedial order; and

(b) If the appeal is of a remedial order that was issued subsequent to a notice of probable violation that relates to an order or interpretation previously issued by the FEA, with respect to which there was an exhaustion of administrative remedies, no issues will be considered on the current appeal that were raised in that prior proceeding.

(c) If an issue raised on an appeal of a remedial order is also being considered in connection with any other FEA proceeding, the FEA may consolidate such issues and consider them in the appellate proceeding for the remedial order.

§205.109 Timeliness.

(a) When the FEA has received all substantive information deemed necessary to process any appeal filed under this subpart, the FEA shall serve notice of that fact upon the appellant and all other persons who received notice of the proceeding pursuant to the provisions of §205.104; and if the FEA fails to take action on the appeal within 90 days of serving such notice, the appellant may treat the appeal as having been denied in all respects and may seek judicial review thereof.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the FEA fails to take action on the appeal within 120 days of the filing of the appeal, the appellant may treat it as having been denied in all respects and may seek judicial review thereof.

APPENDIX G

Ruling by the Federal Energy Administration

Title 10—Energy

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

[Ruling 1975-6]

NATURAL GAS LIQUID PRODUCTS

Pricing Prior to January 1, 1975

On December 20, 1974, FEA issued a new subpart K to 10 CFR, Part 212, the Mandatory Petroleum Price Regulations, effective January 1, 1975. Subpart K provides regulations designed specifically to cover the pricing of natural gas liquids and natural gas liquid products (propane, butane, and natural gasoline). The pricing of these items was, until December 31, 1974, subject to Subpart E of the FEA price regulations, which applied generally to "refiners," a term defined in 10 CFR 212.31 to include a firm that "refines liquid hydrocarbons from oil and gas field gases * * * ." Both refiners of crude oil and of natural gas and natural gas liquids are included within this definition. The new Subpart K was adopted to provide a set of price rules tailored to the purpose of regulating the prices charged for liquid products produced from natural gas, since the process of extracting liquid hydrocarbon products from natural gas differs in significant respects from the process of refining such products from crude oil.

In adopting the new Subpart K regulations, the FEA intended to accomplish three basic objectives: first, to provide a specific method by which maximum lawful prices for natural gas liquid products shall be computed, including a method by which increased product costs may

be passed through in prices charged for products; second, to provide a method by which those entities whose May 15, 1973 selling prices for natural gas liquid products were abnormally low could adjust their prices to reflect more closely industry-wide average prices for those products on that date; and third, to provide a method by which refiners may pass through increased non-product costs attributable to gas plant operations.

To accomplish the first of these objectives, FEA provided for the passthrough of increased product costs associated with obtaining natural gas liquids and liquid products, expressly including increased costs of natural gas shrinkage, in a manner analogous to that provided in Subpart E of the FEA regulations for the passthrough of increased product costs. The reason for implementation of this method of increased cost passthrough was, in part, to provide a specific method by which the increased costs of raw materials associated with gas processing may be recovered in the prices charged for products that is basically equivalent to the method by which the increased costs of raw materials associated with crude oil refining may be recovered in prices charged for products. For processors of natural gas, the equivalent of increased product cost is the increase in the cost of "shrinkage" which occurs in the natural gas stream as a result of the extraction of natural gas liquids. The refiner's price rules of Subpart E, which applied to prices charged for natural gas liquid products until December 31, 1974, provided for the passthrough of increased product costs, but did not expressly indicate that sellers of natural gas liquids and liquid products could recover increased natural gas "shrinkage" costs as increased product costs, in prices charged for processed products.

To accomplish the second objective, FEA provided in Subpart K for the use of adjusted May 14, 1973 prices by

those firms that had May 15, 1973 selling prices for natural gas liquid products that were below average.

To accomplish the third objective, FEA included in Subpart K a provision for the passthrough, in prices charged for processed products, of actual increases in non-product costs attributable to gas plant operations, subject to a maximum limitation of $.005 per gallon.

The changes in the regulations effected by Subpart K were prospective. The FEA has concluded, however, that the basic issues which the Subpart was intended to resolve have been in existence since the inception of FEA regulations, and that, insofar as practicable, they need to be resolved with respect to the period prior to January 1, 1975, during which Subpart E applied to the pricing of natural gas liquid products, particularly in view of the fact that FEA compliance actions, as well as private rights, remain dependent in large measure upon the application and interpretation of Subpart E to natural gas liquid product price determinations.

FEA is therefore issuing this ruling to make clear that increased costs of natural gas shrinkage could be passed through as increased product costs pursuant to the provisions of Subpart E, and, generally, to more clearly describe the application of the price rules of Subpart E in determining natural gas liquid product prices, before Subpart K became effective on January 1, 1975.

Also, since there were no provisions in Subpart E for use of adjusted May 15, 1973 prices by those firms that had lower than average prices on that date, and since the atypical pricing patterns of May 15, 1973, which are permitted to be adjusted by Subpart K, have affected firms since before the effective date of Subpart K, the FEA is proposing, concurrently with the issuance of this ruling, a class exception to permit the adjusted May 15,

1973 prices of Subpart K to be applied retroactively. The exception proposal also contains provisions to afford pass-through of actual non-product cost increases incurred prior to January 1, 1975, subject to a specific per gallon limitation.

Facts: Firms A, B and C are "refiners," as defined in 10 CFR 212.31, which process natural gas or natural gas liquids and recover natural gas liquid products (propane, butane and natural gasoline), which they sell. During 1974, Firms A, B and C obtained natural gas or natural gas liquids for processing in their plants under three different arrangements:

(1) Firm A purchased a mixed stream of natural gas liquids at a fixed price per gallon from Firm X, a firm which had extracted the natural gas liquids from natural gas. Firm A fractionated the mixed stream of natural gas liquids and sold the resulting natural gas liquid products.

On May 15, 1973, Firm A purchased the mixed stream of natural gas liquids from Firm X at a rate of 6 cents per gallon for the propane content, 6.5 cents per gallon for the butane content, and 8.5 cents per gallon for the natural gasoline content. During November 1974, Firm A purchased the mixed stream of natural gas liquids at a lawful rate of 8 cents per gallon for the propane content, 8.5 cents per gallon for the butane content, and 10.5 cents per gallon for the natural gasoline content.

(2) Firm B purchased "wet" natural gas under a "net back" contract arrangement with Firm Y, a natural gas producer. Title to the "wet" natural gas passed to Firm B at the wellhead, and Firm B transported the gas to its gas plant, where the natural gas liquids were extracted and fractionated into natural gas liquid products. Both the natural gas liquid products and the residue gas were sold by Firm B, subject to the "net back" arrangement with

Firm Y. Firms B and Y shared in the proceeds from the sale of the natural gas liquid products and from the sale of the residue gas on a percentage basis. On May 15, 1973, Firm B sold its residue gas at a rate of 23 cents per MCF, and In November, 1974, it sold the residue gas at a rate of $1.50 per MCF; and

(3) Firm C produced and processed "wet" natural gas in its plants to extract natural gas liquids and to fractionate those liquids into natural gas liquid products. Firm C sold the natural gas liquid products and the residue gas. On May 15, 1973, Firm C sold its residue gas at a rate of 22.3 cents per million BTU's and in November, 1974 it sold the residue gas at a rate of $1.45 per million BTU's.

On May 15, 1973, Firms A, B and C all sold the natural gas liquid products from their gas plants to Firm M, a distributor and marketer of natural gas liquid products, at 7.5 cents per gallon for propane, 8 cents per gallon for butane, and 10 cents per gallon for natural gasoline.

Issue: For months prior to January 1975, how should Firms A, B and C have computed the amount of increased product costs which were available for recovery in the base prices of their natural gas liquid products pursuant to § 212.83?

Ruling: It is an underlying principle of all of FEA pricing regulations that refiners, resellers and retailers of crude oil and petroleum products be permitted to recover increases in their product costs on a dollar-for-dollar basis in the prices permitted to be charged. Section 4(b)(2)(A) of the Emergency Petroleum Allocation Act of 1973 generally provides that recovery of increased product costs be permitted on a dollar-for-dollar basis.

Thus, for example, in implementing this principle, the "base price" for products sold by a refiner under FEA's pricing regulations (and before that under the Cost of

Living Council's regulations) has been defined by the following general rule:

The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83.

Section 212.83(b) of the FEA regulations (which is identical to the corresponding section of the predecessor CLC regulations in Title 6 of C.F.R.) includes within the definition of "increased product costs" for products refined and sold by a refiner, "the difference between the total costs of crude petroleum during the month of measurement and the total cost of crude petroleum during the month of May 1973...." Methods for computing this difference and allowing it to be passed through on a dollar-for-dollar basis are described in the refiner's cost formulae contained in § 212.83(c).

Although Subpart E of Part 212 of FEA's regulations specifically address only the passthrough of the increased cost of crude petroleum and petroleum product, a comparable dollar-for-dollar passthrough of increased shrinkage costs is also permitted for the reasons stated above. A dollar-for-dollar passthrough of all increased product costs may therefore be achieved by firms A, B and C in the foregoing fact situations as follows:

Firm A. Firm A is entitled to increase its May 15, 1973 selling price for its natural gas liquid products in the month following the month of measurement to reflect increased costs of the mixed gas liquid stream which it purchased for processing during the month of measurement. Since Firm A purchases its mixed stream at a fixed

price per gallon, its increased product costs under § 212.83 are equal to the difference between the per gallon cost of the mixed stream on May 15, 1973 and the per gallon cost during the month of measurement multiplied by the number of gallons purchased by Firm A during the month of measurement.

Firm B. In many instances in which natural gas is processed pursuant to "net back" arrangements, such as that between Firms B and Y, the equivalent of increased product costs incurred by crude oil refiners is the increased cost of natural gas shrinkage. That is, an increase in the amount by which the value of the unprocessed natural gas is reduced through processing. This reduction in value is often referred to as the cost of natural gas "shrinkage." The cost of such shrinkage is the reduction in sales revenues that could otherwise have been received for the natural gas pursuant to the contract under which the gas is being sold, if its volume or BTU content had not been reduced through processing to extract natural gas liquids.

Accordingly, where the natural gas sales revenues are reduced by processing, and where the selling price of the natural gas that has been processed has increased since May 15, 1973, the cost of shrinkage resulting from extraction of the liquids will also have increased. The FEA considers this increased shrinkage to be an "increased product cost" under § 212.83 and it may therefore be recovered on a dollar-for-dollar basis in Firm B's base prices for natural gas liquid products in the month following the month of measurement.

The cost of shrinkage shall be determined by comparing the value of the natural gas prior to processing with the value of the natural gas after processing. The value of the natural gas stream for this purpose shall be computed by reference to the contractual terms in effect for the sale of

Firm B's "residue" natural gas during the relevant month. For example, since the sale of residue gas by Firm B was made on a volumetric basis, shrinkage costs incurred by Firm B as a result of extraction from the gas stream must be calculated on a volumetric basis. On the other hand, if Firm B sold its residue gas on a $/MMBTU basis during the relevant month, its shrinkage costs would be determined on the same basis. Any increase in the cost of shrinkage shall be determined by comparing the cost of shrinkage respecting a particular stream during the month of May, 1973, with the cost of shrinkage during the month of measurement.

Since there is no sale of the natural gas liquid products and the residue gas under the "net-back" arrangement for which a per-unit price can be determined until after the gas has been processed, the increased cost of shrinkage is calculated with respect to residue gas sold in the month of measurement and is then applied in the month following the month of measurement to the May 15, 1973 selling price of the natural gas liquid products with the proceeds from these sales by Firm B apportioned between Firm B and Firm Y as provided by the "net-back" agreement:

Firm C. Firm C also incurs "shrinkage" costs when it removes natural gas liquids from its natural gas stream since the revenues received for its natural gas stream are thereby reduced. Firm C is therefore entitled to recover its shrinkage costs on a dollar-for-dollar basis under § 212.83 in the same manner as Firm B, above.

ROBERT E. MONTGOMERY, JR.,
General Counsel,
Federal Energy Administration.

MAY 23, 1975.

[FR Doc. 75-14041 Filed 5-27-75;0:51 am]

APPENDIX H

DECISION AND ORDER*

OF THE FEDERAL ENERGY ADMINISTRATION

Appeal

Name of Petitioner:	McCulloch Gas Processing Corporation
Date of Filing:	September 25, 1974
Case Number:	FEA-0248

On September 12, 1974 the Federal Energy Administration issued a Decision and Order to the McCulloch Gas Processing Corporation (MGPC) which denied MGPC's Request for Exception from the provisions of 10 CFR 212.82. *McCulloch Gas Processing Corp.* CCH Fed. Energy Guidelines, Par. 20,659 (September 12, 1974). That exception request, if granted, would have permitted MGPC to increase the prices which it charges for propane, butane and natural gasoline by approximately 20 cents per gallon above its current maximum allowable selling prices for those products. The Order denying MGPC's exception request was generally based on the conclusion that MGPC's past, current and projected financial difficulties were primarily a result of its low and rapidly declining ratio of natural gas supply to processing capacity (supply-to-capacity ratio) and could be alleviated through new purchases of natural gas supplies under contractual arrangements other than those which it has traditionally utilized.

---

*This document contains information which is arguably confidential under 18 U.S.C. 1905.

On September 25, 1974 MGPC filed an Appeal from that Decision and Order and, on October 2, 1974 requested a Stay of the provisions of 10 CFR 212.82 pending a determination on its Appeal. After considering the unusual nature of the relief requested, the impact such relief could have on MGPC's customers, the virtual impossibility of restoring the *status quo ante* if a stay were granted and MGPC received less than full relief on appeal and the fact that MGPC had not made a substantial and convincing showing that it would suffer irreparable injury during the period of time in which its appeal was being considered, the FEA denied the request for stay. *McCulloch Gas Processing Corp.,* CCH Fed. Energy Guidelines, Par. 21,658 (October 23, 1974). If MGPC's Appeal is granted, the FEA's September 12 Order to MGPC would be rescinded and MGPC would be authorized to increase its selling prices for the propane, butane, and natural gasoline which it produces to levels substantially above its current maximum allowable price levels for those products as determined pursuant to the provisions of 10 CFR 212.82.

MGPC, a wholly owned subsidiary of the McCulloch Oil Corporation (McCulloch), engages solely in the processing of natural gas into propane, butane and natural gasoline and is thus a refiner as that term is defined in 10 CFR 212.31. In its gas processing operations, MGPC purchases natural gas (commonly referred to as "wet gas" or "casinghead gas" from producers generally located in the Powder River Basis of Wyoming and transports this gas to its plants via pipelines (gathering lines) which it constructs at its own expense. At these plants the natural gas is refrigerated and pressurized into its liquid components — propane, butane and natural gasoline — and these products are sold to customers at prices which are calculated pursuant to the provisions of 10 CFR 212.82. MGPC also sells the natural gas which survives

processing ("residue gas") to interstate pipelines operated by McCulloch subsidiaries at prices which are regulated by the Federal Power Commission.

MGPC projects that it will process 71 million gallons of natural gas during 1974. In doing so MGPC will utilize only one-half of its total processing capacity. At this volume of operation MGPC's weighted average unit cost for the products which it produces, excluding the cost of the natural gas itself, is 9.1 cents for each gallon of natural gas which it purchases. In comparison, MGPC's current maximum allowable markup level (a figure which represents the revenues which MGPC actually receives after paying the royalty for natural gas) is 5.36 cents per gallon of natural gas. Since MGPC must spend substantially more to process each gallon of natural gas than it may receive from its customers under current FEA Price Regulations, the firm expects to experience an operating loss during 1974 which it projects will amount to $764,000. In addition, MGPC's current reserves are rapidly being depleted and the firm projects that it will process only 43.3 million gallons of natural gas and operate at 33 percent of capacity during 1975 unless it purchases new natural gas supplies. Since MGPC's per unit operating costs will increase at an accelerating rate as its reserves decline, MGPC's projected 1975 operating losses will be substantially greater than those projected for 1974 unless it purchases new supplies of natural gas. In this connection it should be noted that MGPC has experienced operating losses each year since 1970, when it was acquired by McCulloch, and that its total operating losses since that acquisition have accumulated to over $2.5 million. MGPC has been able to continue to operate despite its historic losses because of substantial advances from its parent firm. However, these advances were made

in anticipation of future profits and McCulloch has suggested that it will be forced to close or sell MGPC if it can no longer expect that MGPC will operate profitably.

The provisions of 10 CFR 212.82 generally require refiners, such as MGPC, sell each product which they produce to each class of customer at a price which equals the price at which that product was sold to that class of customer on May 15, 1973 plus increased product costs which the refiner has incurred since May 15, 1973. That provision essentially requires refiners to maintain the same dollar markups on their products as were in effect on May 15, 1973. However, MGPC has customarily purchased natural gas under long-term royalty agreements under which it takes title at the wellhead to all natural gas produced by a well during the life of the well and in return pays a royalty to the well owner which is calculated as a specified percentage of the proceeds which MGPC receives from the sale of the natural gas liquids and residue gas which it processes from the natural gas produced from that well. MGPC currently pays producers an average royalty of 28 percent of the sales price of natural gas liquids and 80 percent of the sales price of residue gas. As a consequence of these royalty agreements, the selling prices of MGPC's products and thus the dollar amount of the royalty it ultimately pays natural gas producers cannot be increased without increasing MGPC's markup levels, a result prohibited by 10 CFR 212.82. Thus, in order to maintain its May 15, 1973 markup levels to comply with the requirements of Section 212.82 MGPC must sell its products at the price levels which were in effect on May 15, 1973, viz., an average of 7.45 cents per gallon for each gallon of natural gas liquids which it sells. Consequently, MGPC returns royalty payments to producers which equal those it paid on May 15,

1973 and which currently average 2.09 cents per gallon of natural gas.(2)

(2) MGPC's current average price and markup levels are summarized in the Table A below.

TABLE A

MGPC'S current average sales price and average markup levels (cents per gallon of natural gas)

	Sales Price	Royalty Returned to Producer	Markup Retained by MGPC
propane	6.88	1.92	4.96
butane	7.75	2.17	5.58
natural gasoline	8.57	2.40	6.17
weighted average	7.45	2.09	5.36

On the other hand, MGPC's competitors for natural gas supplies, which are major integrated oil companies, are selling natural gas liquids for substantially higher prices than MGPC can charge and are paying royalties for natural gas which are also significantly higher than MGPC's. This situation occurs under the current regulatory system because these oil companies obtain propane and butane (the predominant forms of natural gas liquids) from both natural gas and crude oil and are permitted to include the higher price paid for crude oil in calculating their average selling prices for these products. This cost averaging process and the greater pricing flexibility which the major oil companies are offered as a result enables these companies to make significantly higher dollar payments to natural gas producers than MGPC can afford to pay. As a result of this payment disparity, MGPC has not been able to purchase the production rights to any new wells drilled in the Powder River Basin during the past year. Consequently MGPC

must continue to operate its plants solely on the output of its rapidly declining current reserves. In this regard it should be noted, however, that the impact of this price disparity affects not only MGPC but all other independent natural gas processors as well.

In its appeal submission, MGPC contends that the September 12, 1974 Decision and Order erroneously determined that MGPC could eliminate its operating losses without an exception authorizing it to increase its weighted average markup levels. In support of this contention, MGPC has presented evidence which indicates that its current maximum allowable markup levels are insufficient to enable it to (i) recover operating expenses at current or projected processing volumes or (ii) earn any return on investments in new gathering lines necessary to tie in new sources of natural gas production.

MGPC also alleges that exception relief, if it is to have any beneficial long-term effect on its operations, must enable MGPC to purchase new supplies of natural gas at price and royalty levels which are competitive with those offered by other gas processors in the Powder River Basin without requiring MGPC to utilize new forms of royalty agreements. Otherwise, MGPC alleges, it will incur an even greater financial hardship in the future as its current reserves are depleted. In regard to this contention, MGPC alleges that the September 12, 1974 Decision and Order erred in determining that MGPC could purchase new supplies of natural gas if it simply chose to enter into new forms of contractual arrangements with producers. MGPC specifically contends that any new form of payment procedure which it could conceivably implement to purchase natural gas would either (i) be commercially unacceptable to natural gas producers, (ii) be so vague in terminology as to present the continuing possibility of expensive and prolonged litigation, or (iii) present the

continuing possibility that MGPC will experience a future serious financial hardship caused by extreme and unanticipated fluctuations in the market prices of the products which it sells.

On September 10, 1974, the FEA indicated in a preface to a proposed rulemaking, CCH Fed. Energy Guidelines, Par. 12,529, that it was aware that the requirements and provisions of the refiner's pricing formulae, 10 CFR Part 212, Subpart E, were ill-suited to the customs and needs of the natural gas processing industry and that, as a result, many independent natural gas processors were, as a class, experiencing operating difficulties which could, if continued, have serious adverse long-term consequences. At that time, the FEA published as a proposed rulemaking Subpart K to Part 212 of the Regulations which specifically regulated the pricing of allocated products processed from natural gas. Shortly thereafter, the FEA conducted hearings on this proposed rulemaking at which representatives of MGPC and other natural gas processing firms testified. Subsequent to those hearings the FEA indicated that it would issue new regulations in the immediate future revising in a substantial manner the present general requirements. To the extent that MGPC's request for exception and its present appeal relates to the basic structure of the present regulatory system it would be inappropriate for exception relief to be granted at this time in view of the fact that the present regulatory system applies in the same way to all independent natural gas processors. MGPC has not demonstrated that the nature of the present regulatory structure affects it in a manner which is so different from the way in which other similarly situated independent natural gas processors are affected so as to result in a gross inequity to MGPC. Moreover, as stated above the FEA has indicated that it recognized the problem which the MGPC situation illustrates and is

prepared to promulgate general changes in the applicable regulations.

On the other hand, the data which MGPC has presented in its present appeal does demonstrate that certain findings made in the FEA Decision and Order issued to the firm on September 12, 1974 were erroneous as a matter of fact and that the firm's present financial posture as set forth above results in a serious financial hardship. In order to alleviate the serious hardship found to exist the FEA has determined that interim exception relief should be provided at this time pursuant to which MGPC would be permitted to adjust its May 15, 1973 selling prices for the purposes of Section 212.82 so that if the resultant price increases were apportioned over the course of 1974 MGPC would not have experienced the $764,000 operating loss which it projects it will incur during its 1974 fiscal year. A further determination has been made that the FEA Office of Exceptions and Appeals should retain jurisdiction over this matter so that MGPC may petition for further exception relief in the event the FEA regulations which are generally applicable to independent natural gas processors are not revised by December 15, 1974 so as to alleviate any gross inequity or further serious hardship which MGPC alleges that it is experiencing.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by the McCulloch Gas Processing Corporation from a Decision and Order issued to it by the Federal Energy Administration on September 12, 1974 is granted in part as set forth below.

(2) The FEA Office of Exceptions and Appeals shall retain jurisdiction of this matter for further findings set forth in Paragraph (6) below.

(3) The McCulloch Gas Processing Corporation is hereby granted interim exception relief as set forth in Paragraph (4) below.

(4) Notwithstanding contrary provisions in 10 CFR, Part 212 MGPC may determine its May 15, 1973 selling price for propane, butane and natural gasoline for purposes of Section 212.82 by determining the weighted average price at which each such product was lawfully sold to each class of customer on May 15, 1973 and by then adding to each of those prices an amount necessary to increase the overall weighted average selling price for the covered products which MGPC obtains from natural gas by no more than 1.5 cents per gallon of natural gas liquids processed.

(5) In the event the FEA promulgates new generally applicable regulations which govern the determination of the maximum permissible selling prices of propane, butane and/or natural gasoline, the FEA may by written order rescind this interim exception approval in whole or in part; provided that, prior to taking any such action, the FEA shall inform the McCulloch Gas Processing Corporation of the proposed action and afford MGPC of an opportunity to comment upon that proposed action.

(6) In the event the FEA does not issue the revised regulations referred to in Paragraph 5 above by December 15, 1974, or in the event such revised regulations are issued but are determined by the McCulloch Gas Processing Corporation to be inadequate to alleviate any serious hardship or gross inequity which MGPC continues to experience MGPC may petition the FEA for further exception relief.

(7) The interim exception relief set forth above is based upon the presumed validity of statements, allegations and documentary material submitted by the applicant. It may be revoked or modified at any time upon a determination that the factual basis underlying the exception application is incorrect. It may also be revoked or modified at any time in the event that general regulations or requirements of the Federal Energy Administration are modified in a manner which the FEA determines to be contrary to the basis of this exception request or if the FEA determines that substantial material changes have occurred in the factual setting which formed the basis of this exception application.

(8) Unless further orders are issued by the FEA with respect to this matter on or before December 31, 1974 this Decision and Order shall be a final determination of the FEA on the Appeal which the McCulloch Gas Processing Corporation filed from which any aggrieved party may seek judicial review.

Melvin Goldstein
Director
Office of Exceptions and
Appeals

Date: Nov. 22, 1974

APPENDIX I

DECISION AND ORDER
OF THE FEDERAL ENERGY ADMINISTRATION
SUPPLEMENTAL ORDER

Name of Petitioner: McCulloch Gas Processing Corporation

Date of Filing: September 25, 1974

Case Number: FEA-0248

On November 22, 1974 the Federal Energy Administration issued a Decision and Order to the McCulloch Gas Processing Corporation (MGPC) which granted interim exception relief from the application to it of 10 CFR 212.82. *McCulloch Gas Processing Corporation,* CCH Fed. Energy Guidelines, Par. 20,186 (November 22, 1974). The Order which was issued in that case specified that:

> Notwithstanding contrary provisions in 10 CFR, Part 212 MGPC may determine its May 15, 1973 selling price for propane, butane and natural gasoline for purposes of Section 212.82 by determining the weighted average price at which each such product was lawfully sold to each class of customer on May 15, 1973 and by then adding to each of those prices an amount necessary to increase the overall weighted average selling price for the covered products which MGPC obtains from natural gas by no more than 1.5 cents per gallon of natural gas liquids processed.

MGPC's business activities primarily consist of processing natural gas liquids into propane, butane and natural gasoline. Thus, MGPC is considered a refiner as that term is defined in 10 CFR 212.31, and prior to January 1, 1975, was required to calculate the maximum

permissible prices for the natural gas liquid products which it sells pursuant to the provisions of 10 CFR, Part 212, Subpart E. Subpart E contains the refiner's pricing formula which, prior to January 1, 1975, was applicable to both refiners of crude petroleum and processors of natural gas liquids.

On September 10, 1974 the FEA published a proposal to issue regulations specifically designed to regulate the prices of natural gas liquids. The FEA stated that these regulations would be set forth in a new Subpart K of Part 212 (39 F.R. 32717). CCH Fed. Energy Guidelines, Par. 12, 529 (September 10, 1974). Although those new regulations had not been issued on November 22, 1974, when the Order approving exception relief to MGPC was issued, the publication of the new regulations was imminent, and would eliminate the competitive and price conditions which formed the basis of MGPC's exception application. Consequently, the November 22 Order issued to MGPC also stated that:

> In the event the FEA promulgates new generally applicable regulations which govern the determination of the maximum permissible selling prices of propane, butane and/or natural gasoline, the FEA may by written order rescind this interim exception approval in whole or in part; provided that, prior to taking any such action, the FEA shall inform the McCulloch Gas Processing Corporation of the proposed action and afford MGPC of an opportunity to comment upon that proposed action. In the event the FEA does not issue the revised regulations referred to in Paragraph 5 above by December 15, 1974, or in the event such revised regulations are issued but are determined by the McCulloch Gas Processing Corporation to be inadequate to alleviate any serious hardship or gross inequity which MGPC continues to

experience MGPC may petition the FEA for further exception relief.

New regulations concerning the pricing of natural gas liquids and natural gas liquid products were not issued by December 15, 1974 and on December 16, 1974 MGPC requested that the FEA reconsider its submission and grant it further relief. However, on December 19, 1974, the FEA did issue a new Subpart K to Part 212 of the Mandatory Petroleum Allocation and Price Regulations which contained a comprehensive regulatory mechanism with respect to the pricing of natural gas liquids and natural gas liquid products. Those regulations became effective on January 1, 1975 (39 F.R. 44415 December 24, 1975). In view of the publication of Subpart K the FEA notified MGPC in a letter dated January 13, 1975, that the November order specified that the exception relief granted was of an interim nature and would terminate upon the issuance by the FEA of new regulations concerning the pricing of natural gas liquids. The FEA also indicated in that letter that if MGPC determines that the provisions of 10 CFR, Part 212, Subpart K are insufficient to alleviate any serious hardship or gross inequity which the firm was experiencing prior to the promulgation of Subpart K, the firm should request an exception from the provisions of 10 CFR, Part 212, Subpart K. That exception request is presently being considered by the Office of Exceptions and Appeals.

Since January 1, 1975 the maximum permissible prices which MGPC may charge for the covered products which it sells are required to be calculated under the provisions of 10 CFR Part 212, Subpart K. Section 212.163 of that Subpart provides that with respect to a net back sale of natural gas liquids, a gas plant owner or operator may not charge per gallon prices in excess of per gallon revenues received in such sales on May 15, 1973. In the case of first

sales as defined in Section 212.162, the maximum price that may be charged is equivalent to the weighted per gallon revenues recorded in such sales on May 15, 1973. However, Section 212.164(b) also provides that first sale prices of not more than $.085 per gallon for propane, $.09 per gallon for butane and $.10 per gallon for natural gasoline may be used in lieu of the actual May 15, 1973 first sale prices if May 15, 1973 first sale prices were determined on a royalty basis and if the same percentage royalty is used at the present time as served for as the reference for determining the May 15, 1973 first sale prices of natural gas liquids.

Since January 1, 1975 MGPC has calculated maximum permissible prices for the natural gas liquid products which it sells by using the maximum permissible first sale prices specified in Section 212.164(b) instead of actual May 15, 1973 first sale prices. MGPC's actual May 15, 1973 first sale prices are generally lower than the prices specified in Section 212.164(b). The Decision and Order issued to MGPC approved exception relief with respect only to Section 212.82 and was issued prior to the amendment of Subpart K. Since MGPC is afforded more relief under Subpart K as amended than under the terms of the interim exception determination it is appropriate that the interim exception relief granted to MGPC in the Decision and Order issued to it on November 22, 1974 be terminated.

IT IS THEREFORE ORDERED THAT:

(1) The order issued by the Federal Energy Administration to the McCulloch Gas Processing Corporation on November 22, 1974 be and hereby is rescinded.

(2) This order shall become a final order of the Federal Energy Administration from which the McCulloch Gas Processing Corporation may seek judicial review

unless, within 10 days of service hereof, the McCulloch Gas Processing Corporation files with the Office of Exceptions and Appeals information which shows cause why the FEA action is erroneous in fact or law.

Melvin Goldstein
Director
Office of Exceptions and
Appeals

Date: March 6, 1975

APPENDIX J

DECISION AND ORDER*
OF THE FEDERAL ENERGY ADMINISTRATION

Application for Exception

Name of Petitioner: McCulloch Gas Processing Corporation

Date of Filing: January 16, 1975

Case Number: FEE-1393

On January 16, 1975 the McCulloch Gas Processing Corporation (MGPC) submitted an Application for Exception from the provisions of Subpart K of the FEA Mandatory Petroleum Pricing Regulations with the Office of Exceptions and Appeals of the Federal Energy Administration. The request, if granted, would permit MGPC to sell the propane, butane and natural gasoline which it produces from natural gas liquids at price levels substantially above the firm's current maximum permissible price levels for those products as computed pursuant to the provisions of Subpart K.

MGPC, a subsidiary of the McCulloch Oil Corporation (McCulloch Oil), processes natural gas liquids into propane, butane and natural gasoline (natural gas liquid products) as its sole business activity. MGPC is therefore a "gas plant operator" as that term is defined in 10 CFR 212.161(b) and a refiner as that term is defined in 10 CFR 212.31. As a result, the maximum permissible price levels at which MGPC may sell natural gas liquid products are calculated pursuant to the provisions of Subpart K of the FEA Mandatory Petroleum Price Regulations.

This document contains material which is arguably confidential under 18 U.S.C. 1905.

Subpart K generally provides that the maximum allowable price for natural gas liquid products is the weighted average price at which each product was lawfully priced on May 15, 1973. 10 CFR 212.163. However Section 212.164 of Subpart K sets forth an alternative pricing procedure which natural gas processors may use. Pursuant to the provisions of Section 212.164 a gas plant operator may charge 8.5 cents per gallon for propane, 9.5 cents per gallon for butane and 10 cents per gallon for natural gasoline.

In addition, the provisions of Subpart K generally provide that a natural gas plant operator may increase the price of natural gas liquid products on a dollar-for-dollar basis to reflect (i) increased non-product costs attributable to the production of natural gas liquid products incurred since May 15, 1973 by an amount which is not in excess of one-half cent per gallon; (ii) the increased cost of natural gas shrinkage between the month of May 1973 and the current month; and (iii) increased product costs not recovered in previous months.

MGPC has provided data to the FEA which indicates that it computes the weighted average maximum permissible prices for the natural gas liquid products which it sells in the following manner.

TABLE A

	Propane	Butane	Natural gasoline
		(cents per gallon)	
Weighted average base price	8.5	9.5	10.0
Increased product cost for shrinkage .	5.4	5.4	5.4
Increased non-product costs	.5	.5	.5
Total Price	14.5	15.4	15.9

However, MGPC sells approximately one-fourth of the natural gas liquids which it processes to a major oil company under a contract which establishes a price of 5.125 cents per gallon. Consequently MGPC accures certain unrecovered product costs which it recoups by increasing the prices of products which it sells to its other customers to levels which are higher than those set forth in Table A above. As a result, the price levels for MGPC's products are often higher than those of its competitors or of alternative fuel sources and several of MGPC's base period purchasers have consequently refused to purchase product from the firm.

Prior to January 1, 1975, maximum permissible price levels for natural gas liquid products were computed pursuant to the provisions of the Refiner's Pricing Formula, 10 CFR 212.82. Section 212.82 generally requires refiners to sell each product which they produce at the May 15, 1973 selling price for that product plus increased costs incurred by the refiner since May 15, 1973.

MGPC has provided data to the FEA which indicates that its weighted average maximum permissible selling prices on May 15, 1973 were 6.88 cents per gallon for propane, 7.75 cents per gallon for butane and 8.57 cents per gallon for natural gasoline. In prior submissions to the Office of Exceptions and Appeals MGPC has stated that it generally purchases natural gas liquids under royalty agreements whereby it returns to natural gas liquids producers a percentage of the proceeds which it receives from the sale of natural gas liquid products. MGPC further asserted that as a consequence of these royalty agreements it generally incurred no increased product costs and was required pursuant to 10 CFR 212.82 to continue to sell natural gas liquid products at May 15, 1973 price levels. However, in the Form 10-K

which McCulloch Oil submitted to the Securities and Exchange Commission (SEC) for 1974 the firm indicates that during 1974 MGPC experienced an aggregate cost increase of $4,600,000 above the May 15, 1973 weighted average cost per unit of natural gas liquids, and that these increased costs were passed through to the selling prices of its products.

As indicated above, MGPC purchases natural gas liquids from producers under royalty agreements, competing with large integrated oil companies for available supplies. The provisions of Section 212.82 in effect prior to January 1, 1975 and prior regulations under Phase IV of the Economic Stabilization Program permitted integrated oil companies which also processed natural gas liquids to sell natural gas liquid products at prices which were in part based on crude oil costs. As a result of substantial increases in crude oil costs, MGPC's competitors sold natural gas liquid products at prices substantially above the maximum price levels which MGPC was permitted to charge and they consequently offered substantially larger royalties to natural gas liquid producers.

MGPC asserts that as a result it was generally unable to purchase new supplies of natural gas liquids during the period in which the provisions of Section 212.82 were in effect.

The file in this matter indicates that MGPC first filed a request for exception from the Phase IV Price Regulations on January 2, 1974 with the Internal Revenue Service, Economic Stabilization Program. At that time jurisdiction for such requests was vested in the FEO and MGPC therefore received no response to its request. On June 6, 1974 MGPC filed an application for exception from the provisions of 10 CFR 212.82 with the FEO. The June 6 exception application, if granted, would have permitted the firm to increase the prices at which it sold

natural gas liquid products above its maximum permissible price levels as computed pursuant to 10 CFR 212.82. In its exception application MGPC alleged that it was experiencing a serious financial hardship and gross inequity because its current natural gas liquid reserves were rapidly being depleted and the maximum permissible price levels of it products were insufficient to enable it to compete with major oil companies for the purchase of new supplies of natural gas liquids. MGPC asserted that without new supplies of natural gas liquids to process and sell it would experience substantial operating losses. The firm requested that exception relief be fashioned in a manner that would permit it to compete with major oil companies for the purchase of new supplies of natural gas liquids and enable it to earn a reasonable return on its investments which was necessary to connect new sources of natural gas liquids to its gathering system. That exception request was denied in a Decision and Order issued on September 12, 1974. *McCulloch Gas Processing Corporation,* 1 FEA Par. 20,659 (September 12, 1974). MGPC appealed from that Order and, on November 22, 1974, the FEA issued a Decision and Order in which the MGPC appeal was granted in part on the basis of the financial data submitted and the firm was accorded limited exception relief. *McCulloch Gas Processing Corp.,* 1 FEA Par. 20,186 (November 22, 1974). In the November 22 Order the FEA recognized the validity of a number of the contentions which MGPC had raised in its initial exception request. That Order also indicated that the FEA had initiated general rulemaking proceedings to determine whether the provisions of 10 CFR 212.82 should be amended as they applied to natural gas liquids processors. To the extent that MGPC's exception request related to the basic structure of the regulatory system as

it applied to gas processors the FEA therefore determined that it was inappropriate to grant the firm exception relief. However, with respect to MGPC's projection that it would incur an operating loss of $764,000 during 1974, the FEA determined that the approval of limited exception relief was appropriate. As a result, the FEA authorized MGPC to increase the selling prices of its natural gas liquid products by 1.5 cents per gallon above the maximum permissible selling prices as computed pursuant to 10 CFR 212.82. However, in view of the existence of the rulemaking proceeding to amend the general regulatory requirements the Decision and Order issued to MGPC also stated that the exception relief which had been approved at that time could be terminated by the FEA upon the issuance of new Pricing Regulations for natural gas liquids, provided however that MGPC was given an opportunity to comment upon such an action. The new Pricing Regulations for Natural Gas Liquid Products (Subpart K) became effective on January 1, 1975 and MGPC computed its maximum permissible selling prices according to those new regulations and then added the 1.5 cents per gallon permitted by the November 22 Order. On March 6, 1975 the FEA issued an order notifying MGPC that it proposed to rescind the application of the 1.5 cent per gallon price exception previously granted to the firm. *McCulloch Gas Processing Corp.*, (Supplemental Order) 2 FEA Par. 20,186 (March 6, 1975). In the March 6 Order the FEA informed MGPC of its tentative determination that MGPC had implemental substantial increases in the selling prices of its natural gas liquid products pursuant to the provisions of Subpart K and that as a result the limited exception relief previously granted to the firm was no longer warranted. MGPC was advised of its opportunity to show cause as to why the tentative determination actions set forth in the March 6 Order should not be made final. On March 14, 1975

MGPC submitted material with respect to this matter in which it asserted that the relief granted in the November 22 Order should continue in effect. The material which MGPC submitted was not found to be persuasive and as a result the March 6, 1975 Order became final and on March 20, 1975 the 1.5 cents per gallon price exception relief previously extended to MGPC was terminated.

In its current Application for Exception MGPC asserts that the application of the pricing provisions of Subpart K to its operations causes the firm to incur a serious hardship and gross inequity. MGPC contends that unless exception relief is approved, the firm will incur an operating loss of $93,000 during its 1975 fiscal year and will be able to process only 52 million gallons of natural gas liquids. MGPC asserts that under a 52 million gallon processing volume the firm will be able to employ no more than 40 percent of its processing capacity. MGPC further asserts that its current low processing volume and the operating losses which it is now incurring are a direct result of the impact of prior FEA pricing regulations on its operations. MGPC also contends that in view of its projected financial results for 1975, based on its maximum allowable selling prices as computed pursuant to the provisions of Subpart K, MGPC will be unable to profitably compete for the purchase of new natural gas liquid supplies necessary to increase its processing volume and improve its long-term profitability. MGPC therefore requests that it be granted an exception to increase the maximum allowable selling prices of its natural gas liquid products so as to enable the firm to operate profitably during 1975 and to purchase new supplies of natural gas liquids to supplement its declining current reserves.

In addition to the exception relief discussed above MGPC also requests an exception from the provisions of 10 CFR 212.165. If that request for relief were granted

MGPC would be permitted to implement non-product cost increases in excess of 0.5 cents per gallon notwithstanding the contrary provisions of 10 CFR 212.165. In support of this request MGPC contends that even though its actual non-product costs have declined from an annualized level of $7,356,000 in May 1973 to $5,985,000 in 1975, because of its inability to purchase new natural gas liquid supplies these costs must be allocated over declining production. As a result, MGPC contends that actual per-unit non-product costs have increased by 5.83 cents or over 100 percent since May 1973. According to the MGPC submissions the costs to which it refers have risen from 5.68 cents per gallon in May 1973 to 11.51 cents per gallon in 1975. MGPC asserts that to the extent its declining processing volume is attributable to inequities in prior FEA pricing regulations, it would be grossly inequitable for the FEA to refuse to permit the firm to recover these increased per-unit non-product costs.

As the record in this matter indicates, MGPC has been involved in several proceedings before the FEA in which it requested an exception from FEA Pricing Regulations to permit it to increase the selling prices of its natural gas liquid products above maximum permissible price levels. In each proceeding MGPC has asserted that its projected operating losses and its inability to compete with major oil companies for natural gas liquid supplies warranted the approval of exception relief. On October 29, 1974 MGPC submitted data to the FEA which indicated that the firm would only process 71 million gallons of natural gas liquid products during 1974 and would incur a loss of $764,000 on these operations. On the basis of this and other data submitted by MGPC, the FEA issued an Order on November 22, 1974 which, as indicated above, permitted the firm to sell its products at price levels 1.5 cents per gallon in excess of the maximum permissible price levels for the products as computed pursuant to the

provisions of 10 CFR 212.82. *McCulloch Gas Processing Corp.*, 1 FEA Par. 20,186 (November 22, 1974). The extent of the relief granted MGPC was premised on the determination that MGPC would incur no operating losses during 1974 if the exception granted had been in effect throughout that year.

However, on April 21, 1975 MGPC filed material with the FEA which indicated that in direct contrast to its previous projections the firm in fact processed 86.3 million gallons of natural gas liquid products and earned a *profit* of $158,000 on its processing operations during 1974.

MGPC's submission further indicated that the firm earned $461,000 in non-operating income, thereby realizing total pre-tax earnings of $619,000 during 1974. Moreover, as Table B below indicates, 1974 was the first year in MGPC'c operational history in which the firm achieved operating profits.

TABLE B

Historical Profitability of the McCulloch Gas Processing Corporation

Year	Net Profit (loss) on Gas Processing Operations	Non-Operating Income	Total Pre-tax Income (loss)
1971	$ (694,000)	$ 0	$ (694,000)
1972	(797,000)	43,000	(754,000)
1973	(1,218,000)	154,000	(1,064,000)
1974	158,000	461,000	619,000

In view of the data submitted by MGPC with respect to its profitability during 1974 and prior years, it is apparent that the firm's financial results during 1974 represented a substantial improvement over those of prior years. In direct contrast to its previous representations to the FEA

MGPC incurred no hardship during 1974 which warranted the approval of exception relief. Therefore, contrary to MGPC's assertions, the FEA properly determined in the March 6, 1975 Supplemental Order that the exception relief previously granted to MGPC should be terminated. See *McCulloch Gas Processing Corp.*, 2 FEA Par. 20,186 (March 6, 1975) (Supplemental Order).

It should also be noted that there are substantial additional and serious discrepancies between MGPC'c projections of its financial and operating posture during 1974 as set forth in the firm's submissions to the FEA on October 29, 1974, and the date which reflects its actual operations as submitted to the FEA on April 21, 1975. In its October 29 projection MGPC underestimated its 1974 processing volume by approximately 15.3 million gallons, or 21 percent of the firm's estimated annual production. MGPC's estimate of its 1974 operating income was also $900,000 less than its actual results, an amount which represents approximately 10 percent of the firm's estimated total revenue for 1974.

In view of MGPC's size, sales revenues, and the fact that the projections at issue were prepared during the tenth month of the fiscal year in question, the degree of error in those projections was very substantial. In the absence of any showing that MGPC has improved its projection techniques, the magnitude of the prior errors undermines the reliability of similar projections as to its 1975 fiscal year which MGPC has provided in support of its present exception application.

In its current exception application MGPC projects that in the absence of exception relief it will incur an operating loss of $93,000 during 1975. This projected operating loss represents less than one percent of the firm's projected sales revenue during 1975. In view of the substantial magnitude of error which has occurred in past

projections as to its financial and operating posture and the other facts and circumstances set forth above, the FEA has determined that MGPC has failed to make a convincing showing that it will incur a serious financial hardship during 1975 as a result of the application to it of the FEA regulatory programs. As the FEA has previously stated, data submitted by a firm in support of an exception request must form a reasonable basis from which the firm's allegations can be evaluated. *Urich Oil Company,* 2 FEA Par. 83,105 (March 24, 1975). If the data presented is subject to question, because no improvement over prior inaccurate projection techniques has been demonstrated, and is thus potentially inconsistent or otherwise erroneous to a degree which undermines its reliability, then the applicant has failed to meet its regulatory burden of presenting sufficient facts and arguments to the FEA from which a conclusion can be reasonably drawn that relief is appropriate. Under these circumstances the FEA must of necessity conclude that the applicant has failed to meet the regulatory standards set forth in 10 CFR 205.50 et seq. and has failed to establish that exception relief is warranted. cf. *Rock Island Refining Corporation,* 2 FEA Par. 83,097 (March 28, 1975) The principles set forth above are directly applicable to the Application for Exception which was filed by the McCulloch Gas Processing Corporation.

IT IS THEREFOR ORDERED THAT:

(1) The Application for Exception from the provisions of 10 CFR, Part 212, Subpart K filed by the McCulloch Gas Processing Corporation be and hereby is denied.

(2) In accordance with the provisions of 10 CFR, Part 205, an aggrieved party may file an appeal from this Decision and Order with the Federal Energy Administration. The provisions of 10 CFR, Part 205, Sub

part H set forth the procedures which govern the filing and determination of any such appeal.

Melvin Goldstein
Director
Office of Exceptions and Appeals

Date: May 15, 1975

APPENDIX K

Decision and Order of the Federal Energy Administration

Class Exception
"2 FEA ¶ 84,901"

Retroactive application of Subpart K, Case No. FEX-0012.

Natural gas liquids, natural gas products. — On May 29, 1975, the Federal Energy Administration published a notice of a proposal to issue a class exception to natural gas processors. 40 Fed. Reg. 23320 (May 29, 1975). The exception, if granted, would generally permit the price rules of Subpart K of Part 212 of the FEA Regulations to be applied retroactively. Subpart K sets forth the requirements to which a firm must adhere in establishing its maximum permissible price levels for natural gas liquids and natural gas liquid products. In considering the proposal for class exception relief, the FEA determined that: (i) the May 15, 1973 price levels of natural gas liquids and natural gas liquid products which were used as a reference point under Subpart E of Part 212 (the predecessor to Subpart K) were in disequilibrium and resulted in an inequitable situation for natural gas processors as a class; (ii) the requirement of prenotification for price increases to reflect increased non-product costs which were incurred in 1974 was impractical and onerous for gas processors, many of which were not aware of this procedure, and constituted a further inequity; (iii) in addition, Section 212.83 (e) (1) (iii) (A) (IV), which was not intended by the FEA to apply to propane processed from natural gas, has adversely affected natural gas processors to a significant extent and has also resulted in a gross inequity which warrants exception relief; and (iv)

Section 212.83(e)(5), which limits the recovery of increased costs in months subsequent to the month in which the costs were incurred, was also not intended by the FEA to apply to natural gas processors. In order to alleviate the gross inequities which were found the FEA granted class exception relief to all firms, other than resellers and retailers, which sold natural gas liquids or natural gas liquid products from August 19, 1973, through December 31, 1974, to the extent that these products were produced in gas processing plants. Members of the class were permitted, in determining their maximum selling prices for these products: (i) to use the adjusted May 15, 1973 selling price specified in Subpart K in place of the price specified in Subpart E; (ii) to recover non-product cost increases which the members of the class actually experienced in 1974 up to $.0025 per gallon; and (iii) to disregard certain regulatory provisions otherwise applicable to members of the class. Retroactive billing was prohibited, however, and the prospective effect of the relief was limited each month to the recovery of an amount no greater than ten percent of the increment to the firm's carry-forward of unrecovered costs which resulted from the exception relief provided in the class exception.

[Text of Decision and Order]

On May 29, 1985, the Federal Energy Administration published a notice of a proposal to issue a class exception to natural gas processors. 40 Fed. Reg. 23320 (May 29, 1975). The exception, if granted, would generally permit the price rules of Subpart K of Part 212 to be applied retroactively in those cases where a firm would obtain a benefit from a retroactive application. Subpart K sets forth the requirements to which a firm must adhere in establishing its maximum permissible price levels for

natural gas liquids and natural gas liquid products, including propane, butane and natural gasoline. The FEA solicited comments with respect to the proposed class exception, and on July 10, 1975 a public hearing was held in regard to the proposal.

In the May 29, 1975 notice of the proposed class exception, the FEA stated that, prior to the January 1, 1975 effective date of Subpart K, the FEA Price Regulations applicable to the pricing of natural gas liquids and natural gas liquid products were set forth in Subpart E of the general price regulations applicable to all "refiners"—both of crude oil and natural gas liquids. However, in view of the particular situation existing in the natural gas processing industry, on January 1, 1975 a separate Subpart K of the Price Regulations was adopted dealing exclusively with that segment of the petroleum industry. In adopting the Subpart K regulations, the FEA stated that the determination of the maximum lawful selling price for natural gas liquids and natural gas liquid products was to be a function of:

(1) The May 15, 1973 lawful selling price;

(2) An adjustment to May 15, 1973 selling prices to correct a disequilibrium market condition;

(3) The passthrough of increased product costs, including increased costs of natural gas shrinkage, in a manner analogous to that provided in Subpart E for the passthrough of increased costs of crude oil and petroleum products; and

(4) A specific price increment to permit producers and processors of natural gas liquids to increase their prices to reflect increased non-product costs which they incurred without the necessity of prenotification.

As stated above, prior to the adoption of Subpart K, the pricing of natural gas liquids and natural gas liquid

products was controlled by Subpart E of the FEA price regulations. Those Regulations, however, did not indicate precisely how the price rules of Subpart E, which did not specifically address the activities of natural gas producers and processors, should be construed with respect to those operations.

A major ambiguity of the Subpart E price rules as they related to natural gas processing was that they did not explicitly provide for the recovery of increased natural gas "shrinkage" costs incurred by the extraction of natural gas liquids from the gas (*i.e.* the incremental reduction in value of natural gas after it has been reduced in volume and BTU content by the extraction of liquids). In order to clarify this aspect of the Subpart E Regulations, the FEA issued a ruling which stated explicitly that the provisions of Subpart E which permit a dollar-for-dollar passthrough of increased product costs also afford a passthrough of the increased product costs which result from natural gas shrinkage in the same manner as is now expressly provided by Subpart K. See Ruling 1975-6, [¶ 16,046] 40 Fed. Reg. 23272 (May 29, 1975).

The notice of the proposed class exception stated that the proposed action was designed to eliminate additional inequities which may have resulted from the application of Subpart E to the pricing of natural gas liquids and natural gas liquid products prior to the adoption by the FEA of Subpart K on January 1, 1975.

Having considered the written comments submitted with respect to the proposed class exception and the oral testimony presented at the July 10, 1975 public hearing, the Federal Energy Administration has concluded that:

(a) Subpart K specifies a number of adjustments to the May 15, 1973 lawful selling price of natural gas liquids and natural gas liquid products which gas plant

operators may implement on a prospective basis in determining the maximum permissible selling prices of those products under FEA Regulations. The adoption of Subpart K was based in part upon the judgment of the FEA that the May 15, 1973 price levels of natural gas liquids products which were used as a reference point under Subpart E were in disequilibrium and resulted in an inequitable situation. However, the Subpart K Regulations only partly resolved the inequities that previously existed. Since Subpart K had only prospective effect, the prior inequities that the FEA has acknowledged to have existed were not alleviated by the adoption of Subpart K.

(b) A further inequity existed under the prior regulations with respect to the manner in which processors could increase the prices of the products which they sold to reflect the increased non-product costs which they incurred in 1974. Pursuant to Subpart E of the FEA Regulations, refiners are permitted to pass through "allowable" increased non-product costs, subject to prenotification and profit margin limitations. Although some gas processors were able to follow the prenotification requirements which previously existed with respect to non-product cost increases, some other gas processors, particularly the smaller operators, may not have been aware of the availability of this procedure under the FEA price regulations. Moreover the burdens which these firms faced with respect to prenotification of price increases were significantly different from the procedures applicable to other similar small business operations under FEA Regulations. See, *e.g.,* 10 CFR, Part 212, Subpart F. Furthermore, the requirement of prenotification was particularly impractical and onerous for gas processors, since, in many instances, the ownership of such operations is divided among numerous parties, many of whom have additional interests in other, financially unrelated gas processing operations.

(c) Natural gas processors also encountered considerable difficulty in the past as a consequence of the application to them of Section 212.83(c)(1)(iii)(A)(IV) of Subpart E of Part 212 of the FEA Regulations. That Section provides that a refiner: "* * * may not apportion to propane any increased product costs incurred prior to July 1, 1974 and not recovered through July 31, 1974."

As the FEA clearly stated in the Preamble to the special Propane Rule (of which Section 212.83(c)(1)(iii)(A)(IV) is a part), this provision was designed "* * * to limit the amount of increased costs of crude oil that may be applied to propane prices by a refiner to an amount which is proportional to the quantity of propane produced from crude oil by that refiner." See 39 Fed. Reg. 28608 (August 9, 1974). Although Section 212.83(c)(1)(iii)(A)(IV) was not designed to apply to propane processed from natural gas, a number of gas processors which do not refine crude oil have nevertheless been prevented from passing through actual increased product costs incurred prior to July 1, 1974 to propane as a result of Section 212.83(c)(1)(iii)(A)(IV). In view of the fact that this result was neither envisioned nor intended by the FEA at the time Section 212.83(c)(1)(iii)(A)(IV) was adopted, and in view of the fact that Section 212.83(c)(1)(iii)(A)(IV) has adversely affected natural gas processors to a significant extent, a gross inequity exists which warrants exception relief. See, *Vickers Petroleum Corporation,* 2 FEA ¶ 83,237 (August 8, 1975); *The Oil Shale Corporation,* 2 FEA ¶ 83,198 (June 27, 1975); *Kerr-McGee Corporation,* 2 FEA ¶ 83,197 (June 27, 1975); *Continental Oil Company,* 2 FEA ¶ 83,057 (March 10, 1975) *Skelly Oil Company,* 2 FEA ¶ 83,054 (March 6, 1975); and *Midroc Oil Company,* 1 FEA ¶ 20,679 (October 9, 1974).

(d) Finally, is should be noted that, in calculating the carry-forward of unrecovered increased costs prior to the adoption of Subpart K, natural gas processors were required to compute the carry-forward amount in each month in accordance with the provisions of Section 212.83(e) of Subpart E of Part 212 of the FEA Regulations. However, in November 1974 the FEA amended Section 212.83(e) to limit the use of this carry-forward of unrecovered increased costs in months subsequent to the month in which the increased costs were incurred. See Section 212.83(e)(5). This limitation has imposed a significant burden on natural gas processors. The application of Section 212.83(e)(5) to natural gas processors requires that these firms adjust their accounting practices with regard to the carry-forward of unrecovered increased costs under the applicable FEA Regulations for a period of only two months, November and December 1974, and then to change these accounting practices once again on January 1, 1975, in accordance with the provisions of Subpart K of Part 212 of the FEA Regulations. This result was clearly not intended by the FEA in adopting this regulation. In fact, as the introduction which accompanied the adoption of Section 212.83(c)(5) by the FEA indicates, this limitation was designed to apply to the unrecovered increased product costs of refiners of crude oil rather to the unrecovered increased costs of natural gas processors. See 39 Fed. Reg. 39259 (November 6, 1974). In addition, it should be noted that Subpart K, which was adopted to apply specifically to natural gas processors and was promulgated less than two months after the introduction of Section 212.83(c)(5), does not contain any similar limitation with respect to the carry-forward of unrecovered increased costs by natural gas processors after January 1, 1975. See Section 212.167(e). In view of the fact that the effect of Section 212.83(e)(5) on natural gas processors was not intended by the FEA at

the time of its adoption, and in view of the significant adverse effects which the application of Section 212.83(e)(5) to natural gas processors for a period of only two months causes to such firms, a gross inequity exists which warrants exception relief.

(e) Since a significant number of gas processors have been subject to the conditions described above and may in many cases lack sufficient resources to file individual requests for exception, the FEA has determined that class exception relief is appropriate. The exception granted should permit the class to whom it applies to use the adjusted May 15, 1973 prices specified by Subpart K in computing lawful selling prices prior to the effective date of Subpart K. The relief would apply notwithstanding any contrary provisions of Subpart E which were applicable prior to the adoption of Subpart K.

(f) In view of the inordinate burden which natural gas processors as a class experienced as a result of previous prenotification requirements, further exception relief should be granted which would permit members of the class who failed to prenotify price increases to determine the maximum selling prices which they could lawfully charge prior to the publication of Subpart K on the basis of a pass through of no more than $.0025 per gallon of non-product costs actually incurred. The $.0025 limitation is based on the judgment that the maximum increase in non-product costs which natural gas processors generally experienced in 1974 was $.0025 and that any greater degree of relief on a retroactive basis would unduly prejudice purchasers of natural gas liquid products. The relief granted should apply notwithstanding the profit margin limitation set forth in Section 212.11 of Part 212 of the FEA Regulations.

(g) As stated above, the provisions of Section 212.83(c)(1)(iii)(A)(IV) and Section 212.83(e)(5) were

never envisioned or intended to apply to natural gas processors. Consequently, class exception relief should also be provided to members of the class from these provisions.

(h) In weighing the considerations which would lead to the approval of the class exception relief discussed in this Decision, the FEA has taken into account the adverse effect which could be experienced by firms and individuals who purchased natural gas liquid products during the period prior to January 1, 1975. Although natural gas processors have been subject to a certain degree of inequitable treatment in the past, the mitigation of that situation should not be permitted to affect purchasers in an unduly adverse manner. Consequently, the FEA has determined that the exception relief provided in this Decision should be limited in the following manner:

(i) The relief granted should not be implemented in a manner which would result in retroactive billing to purchasers of natural gas liquids and natural gas liquid products;

(ii) If a firm is unable to recover the full measure of relief provided as a result of the restrictions on retroactive billing, it should be permitted to establish a "bank" of unrecovered costs which may be used to implement price increases on a prospective basis in a manner similar to that specified in Section 212.167(e) of the FEA Price Regulations; and

(iii) In order to avoid severe short-term market dislocations or pricing anomalies, the amount of unrecovered costs which a firm should be permitted to recover in any month as a result of the relief provided in this Decision and Order should be further limited to an amount which does not exceed ten percent of the total dollar value of the exception relief provided.

It is therefore ordered that:

(1) The class to whom the exception relief set forth below applies is all firms, including gas plant operators, producers of natural gas, natural gas royalty owners and refiners (except resellers or retailers which are subject to Subpart F of Part 212 of the FEA Regulations), which sold natural gas liquids or natural gas liquid products from August 19, 1973, through December 31, 1974, which were produced in gas processing plants. The class therefore consists of only those firms to which the provisions of Subpart K of Part 212 of the FEA Regulations currently apply, and only to the extent to which the provisions of Subpart K apply to the operations of the firms.

(2) Notwithstanding any contrary provisions of Subpart E of Part 212 of the FEA Regulations, the members of the class referred to in Paragraph (1) may, subject to the limitations set forth in Paragraphs (3) and (4) below, determine their maximum permissible selling prices for the natural gas liquids and natural gas liquid products which they sold from August 19, 1973, through December 31, 1974, by:

(a) Using the adjusted May 15, 1973 selling price specified in Section 212.164 (a) and (b) of the current FEA Price Regulations in all instances in which the term "May 15, 1973 selling price" was used in Section 212.83(a)(1)(ii) of the FEA Regulations applicable to the members of the class from August 19, 1973, through December 31, 1974;

(b) Increasing the adjusted May 15, 1973 selling price specified in Section 212.164(a) and (b) and referred to in subparagraph (a) above by the non-product cost increases which the members of the class actually experienced in 1974, but in no event by more than $.0025 per gallon;

(c) Disregarding the limitation specified in Section 212.11 of the FEA Price Regulations applicable to members of the class;

(d) Disregarding the requirements specified in Section 212.83(c)(1)(iii)(A)(IV) of the FEA Price Regulations applicable to members of the class; and

(e) Disregarding the limitations specified in Section 212.83(e)(5) of the FEA Price Regulations applicable to members of the class during the months of November and December 1974.

(3) The term non-product cost increases as used in this Decision and Order is synonymous with the term "increased non-product costs" as defined in 10 CFR 212.83. In addition, the specific computation of non-product cost increases referred to in Paragraph (2)(b) of this Order shall be made by comparing the average non-product cost which the members of the class actually experienced on a plant-by-plant basis during the fiscal quarter which includes May 15, 1973, with such average non-product costs incurred by the firm on a plant-by-plant basis during the entire 1974 calendar year. The implementation of the non-product cost increase provision of Paragraph (2)(b) is however contingent on each member of the class maintaining detailed records of the costs incurred, the volume of products produced and the manner in which the calculations referred to in this paragraph have been made.

(4) The members of the class may not implement the provisions of this Order by increasing the prices which they charged purchasers of natural gas liquids and natural gas liquid products in transactions concluded prior to the adoption of Subpart K of the FEA Price Regulations either through retroactive billing, provisional billing at the time of the transaction or otherwise. A transaction, for the purposes of this Order, is considered to have

occurred at the time the product is actually delivered to the purchaser. In applying the relief provided by this Order to transactions which occurred prior to the adoption of Subpart K of the FEA Price Regulations, each member of the class shall remain subject to the provisions of Section 212.83(e) of Subpart E of Part 212 in calculating the carryover of unrecouped costs. Each member of the class may however include the adjustments provided in Paragraph (2) of this Order in its calculation of unrecouped increased product costs pursuant to Section 212.83(e). In implementing prospectively the relief provided by this Order each member of the class to whom relief is extended shall increase its carry-forward of unrecovered increased product costs as referred to in Section 212.167(e) of the current FEA Price Regulations by an amount equal to the dollar value of the relief specified in this Order which has not previously been recovered. However, a firm may not use the relief provided in this Order to increase aggregate prices in any month by an amount greater than ten percent of the increment to the firm's carry-forward of unrecovered costs which resulted from the exception relief provided herein.

(5) In accordance with the provisions of 10 CFR, Part 205, an aggrieved party may file an appeal from this Decision and Order with the Federal Energy Administration. The provisions of 10 CFR, Part 205, Subpart H, set forth the procedures and criteria which govern the filing and determination of any such appeal.

Date: August 29, 1975.

Supreme Court, U.S.
FILED
JUL 3 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1888

In the Supreme Court of the United States

OCTOBER TERM, 1985

MGPC, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS C. NEWKIRK
Chief Counsel

LARRY P. ELLSWORTH
Deputy Chief Counsel

DON W. CROCKETT
JOHN L. GURNEY
Attorneys
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20545

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Pasco, Inc. v. *FEA*, 525 F.2d 1391 4

Tully v. *Mobil Oil Corp.*, 455 U.S. 245 3

Statute:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 1

Miscellaneous:

46 Fed. Reg. 9909 (1981) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1888

MGPC, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the Federal Energy Administration improperly terminated an order granting it relief from the operation of petroleum product price control regulations.

1. Petitioner was an independent processor of natural gas. Regulations promulgated in 1973 pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, controlled the prices of natural gas liquid products, such as propane, that petitioner produced and sold. These regulations essentially froze petitioner's prices at their May 15, 1973 levels. Pet. App. 2a-3a.

In June 1974, petitioner applied to the Federal Energy Administration (FEA), a predecessor of the Department of Energy (see Pet. App. 2a n.1), for exception relief, seeking an order allowing it to increase its prices above their 1973 base levels. This increase, petitioner claimed, was necessary

to compensate it for an expected loss in 1974 and for alleged competitive disadvantages with respect to crude oil refiners. *Id.* at 3a. In November 1974, the FEA granted petitioner interim exception relief allowing it to raise its prices by 1.5 cents per gallon in order to compensate for the 1974 operating loss; however, the agency refused to grant petitioner the additional increase it requested to make up for competitive disadvantages, because these were not peculiar to petitioner (*id.* at 4a-6a, 197a-206a). Because the FEA was in the process of promulgating new industry-wide regulations for gas processors, it provided in the order that if new regulations were issued, the agency could "by written order rescind this interim exception approval in whole or in part; provided that, prior to taking any such action, the FEA shall inform [petitioner] of the proposed action and afford [it] an opportunity to comment upon that proposed action" (*id.* at 205). The order further provided that if new regulations were not issued by December 15, 1974, petitioner could apply for further exception relief (*ibid.*).

The new regulations were issued on December 24, 1974. These permitted petitioner to increase its prices for propane by 7.8 cents per gallon. Pet. App. 6a. In January and February 1975, the agency informed petitioner that it was not entitled to use the 1.5 cents per gallon increase in addition to the larger increase provided by the new regulations (*id.* at 7a-8a). In March 1975, the FEA issued a supplemental order formally rescinding the November 1974 interim exception relief granted petitioner (*id.* at 8a, 207a-211a). The supplemental order provided that it would become final unless petitioner filed with the agency within ten days "information which shows cause why the FEA action is erroneous in fact or law" (*id.* at 211a). Petitioner filed a response, which the agency explained in May 1975 was inadequate to demonstrate that the supplemental order should not take effect (*id.* at 8a, 220a-221a). "In direct

contrast to its previous representations," the FEA reasoned, "[petitioner] incurred no hardship during 1974 which warranted the approval of exception relief" (*id.* at 220a-221a). Accordingly, the supplemental order properly terminated the exception relief previously granted (*id.* at 221a).

2. Petitioner filed this action in 1979 in the United States District Court for the District of Wyoming, seeking to enjoin the Department of Energy from denying it the benefit of the November 1974 exception relief. The district court granted summary judgment in petitioner's favor, concluding that the exception relief had never been effectively terminated (Pet. App. 25a-58a; 581 F. Supp. 1047).

The court of appeals reversed and directed that summary judgment be entered in favor of the government (Pet. App. 1a-24a). The court held that the March and May 1975 orders effectively terminated the exception relief granted in November 1974 (*id.* at 12a-14a). It reasoned that the FEA was free to modify its earlier order granting exception relief and that petitioner did have notice of the termination and an opportunity to object to it. The court also held that the agency had voided the exception relief ab initio and that petitioner therefore was not entitled to take advantage of it for its 1974 sales (*id.* at 15a-19a). The court noted in this regard that petitioner did not in fact suffer the operating loss in 1974 that it had projected when it applied for exception relief (*id.* at 17a).

3. Petitioner argues (Pet. 11-16), without citation of authority, that the FEA never properly rescinded its 1974 grant of interim exception relief. The careful opinion of the Temporary Emergency Court of Appeals, "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), correctly rejected this factbound contention. Petitioner's

arguments, which relate to regulations long since rescinded* and to orders applicable to no other persons, obviously merit no further review.

Petitioner contends (Pet. 15) that it was entitled to notice of the proposed termination of its relief, an opportunity to comment on it, and a statement of the agency's reasons for its actions. Petitioner received all of these. It was informed on several occasions that it could not take advantage of both the November 1974 relief and the higher price allowed under the December 1974 regulations, and its response to the March 1975 order rescinding the exception relief was considered by the agency. The FEA's reasoning was set forth in detail in both its March and May 1975 orders (Pet. App. 207a-211a, 212a-223a). Moreover, when it granted the exception relief initially, the agency explained why petitioner's alleged competitive disadvantages did not justify additional price increases (*id.* at 202a-204a). Petitioner has pointed to nothing suggesting that the agency abused its discretion in deciding that petitioner was not entitled to relief beyond that provided in the December 1974 regulations. Cf. *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975) (agency had broad discretion in implementing oil entitlements program).

---

*Prices of all petroleum products were decontrolled in January 1981. 46 Fed. Reg. 9909.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

THOMAS C. NEWKIRK
Chief Counsel

LARRY P. ELLSWORTH
Deputy Chief Counsel

DON W. CROCKETT
JOHN L. GURNEY
Attorneys
Economic Regulatory Administration
Department of Energy

JULY 1985

DOJ-1985-07